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No.

In the
Supreme Court of the United States

THE COUNTY OF NASSAU and JOSEPH JABLONSKY,

Petitioners,

vs.

RAY E. SHAIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Nassau County Correctional Center ("NCCC") instituted a policy to strip search all inmates admitted to the facility, to prevent smuggling of weapons, drugs and other contraband. Respondent brought a lawsuit challenging the policy, after he was arrested for misdemeanor harassment and strip-searched upon admission to the Correctional Center. Applying the Second Circuit's "reasonable suspicion" standard first articulated in *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986), the Court of Appeals declared the policy unconstitutional. In conflict with the Fourth, Seventh and Ninth Circuits, and over the vigorous dissent of Circuit Judge Cabranes, the Court of Appeals declined to apply the more deferential "reasonably related to legitimate penological objectives" standard established by this Court in *Turner v. Safley*, 482 U.S. 78, 87, 89-91 (1987). According to the Court of Appeals, *Turner's* holding is limited to cases involving "prisons" and does not apply to "jails" such as NCCC.

The question presented is:

Whether this Court's holding in *Turner v. Safley*, 482 U.S. 78, 89 (1987), that a prison regulation is constitutional if it bears a reasonable relation to a legitimate penological objective, applies to any detention facility whether it is called a jail, a prison or a correctional center?

PARTIES TO PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were Ray E. Shain, plaintiff-appellee-cross-appellant, Peter Ellison, individually and as a Nassau County police officer,[1] John Doe, individually and as an assistant district attorney of Nassau County, the County of Nassau, Joseph Jablonsky, defendants-appellants-cross-appellees, and James H. Madden, individually and as a Judge of Nassau County, defendant-cross-appellee.

[1] Officer Ellison was incorrectly sued as John Ellison.

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (App., 9 [1]) is reported at *Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001). The opinion and order of the United States District Court for the Eastern District of New York (App., 44) is reported at *Shain v. Ellison*, 53 F. Supp.2d 564 (E.D.N.Y. 1999).

Statement of Basis of Supreme Court Jurisdiction

The judgment of the Circuit Court sought to be reviewed was filed on October 19, 2001 and a timely petition for panel rehearing with suggestion for rehearing *en banc* was denied on May 7, 2002. App., 3. On June 28, 2002, Ruth Bader Ginsburg, Associate Justice of this Court, granted petitioners County of Nassau and Joseph Jablonsky an extension of time until October 4, 2002 to file a petition for a writ of certiorari. App., 1. Jurisdiction to review the judgment of the Circuit Court is conferred by 28 U.S.C. Section 1254(1). Federal jurisdiction in the court of first instance was based on 28 U.S.C. Sections 1331 and 1343.

Constitutional Provision Involved

This case involves the following constitutional provision:

U.S. Const. Amend. IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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[1] References to the Appendix are indicated by "App."

Statement of the Case

This petition seeks review of a Court of Appeals decision that undermines the safety of corrections officers and inmates of county jails, by unreasonably restricting the right to strip search misdemeanor arrestees who may be carrying dangerous weapons and narcotics. At issue is whether constitutional challenges to the policies and practices of local correctional facilities are governed by this Court's holding in *Turner v. Safley*, 482 U.S. 78, 89-91 (1987). Review is sought to resolve a conflict among the circuits on this important question.

This case involves the strip search policy of the Nassau County Correctional Center ("NCCC" or "Correctional Center") in Nassau County, New York. Respondent claimed that NCCC's policy violated his Fourth Amendment right to be free from unreasonable search and seizure. Petitioner submits that the relevant test for assessing such a claim was set forth in *Turner*, which held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89-90. Confronting the Court in *Turner* were constitutional challenges to regulations of the Missouri Division of Corrections. Those rules restricted correspondence between inmates at different prisons and prohibited inmates from marrying without the approval of the prison superintendent. The Court rejected the assertion that the regulations were subject to a heightened standard of scrutiny, on the grounds that "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper the ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.* at 89. Instead, the Court fashioned the "reasonably related" test quoted above, in order to be "responsive both to the policy of judicial restraint regarding prisoner complaints and to the need to

protect constitutional rights." *Id.* at 85 (internal quotation/ citation omitted).

In this case, the Court of Appeals rejected the application of *Turner* in favor of its own standard, first articulated in the pre-*Turner* decision of *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987). *Weber* holds that penological objectives, no matter how compelling, cannot justify strip searches of misdemeanor arrestees, absent reasonable suspicion that they are concealing contraband. Based on *Weber*, the Court of Appeals declared NCCC's policy to be contrary to law.

The Court of Appeals asserted that *Turner* applies exclusively to "prisons" and not to "jails" such as NCCC — "an artificial, untenable distinction," in the view of dissenting Judge Cabranes, which "creates a Circuit split where there was none — a Circuit split that calls out for resolution by the Supreme Court." App., 32. The circuits are "split" because, in contrast to the Second Circuit, the Fourth, Seventh and Ninth Circuits have expressly applied *Turner* in the county jail setting, with the Ninth Circuit squarely rejecting the jail/ prison distinction adopted by the Second Circuit here.

Like the dissent, the concurrence of Circuit Judge Katzmann also questioned the validity of the majority opinion. Although he felt "compelled to follow Circuit precedent," Judge Katzmann acknowledged that the "Circuit's choice to distinguish . . . between . . . jails and prisons is not necessarily persuasive to me. . . ." App., 31.

A. Respondent's Arrest And Incarceration For Threatening His Spouse

This case arose from the July 29, 1995 arrest of respondent Ray E. Shain for allegedly threatening to rape his estranged wife during a domestic dispute. App., 12. According to his spouse, Mr. Shain had a history of abusive behavior toward her. Mr. Shain was taken into custody by Nassau County

police officers and charged with first degree harassment under N.Y. Penal Law Section 240.25 — a misdemeanor. A pat-down search of Mr. Shain's person turned up a pocket knife, which he failed to surrender when specifically directed to empty his pockets. After arraignment on a family offense petition, Mr. Shain was remanded by the Court to NCCC, where he was processed into the facility. App., 13. As part of the intake procedure, Mr. Shain was instructed to disrobe and a male corrections officer conducted a non-invasive, visual body-cavity search, in order to detect weapons or contraband. App., 13, 47. Pursuant to NCCC policy, such searches are conducted in a private cubicle, and do not entail any physical contact. App., 47. Typically, the searches last no more than two minutes. App., 47.

The next morning, Mr. Shain was again strip-searched prior to being transported to an appearance in Nassau County Family Court. Eventually, various charges against Mr. Shain were withdrawn or adjourned in contemplation of dismissal. App., 13.

B. The Nassau County Correctional Center

The NCCC is located in Nassau County, Long Island, in the densely populated New York City metropolitan region. Adjacent to the Borough of Queens in the City of New York, Nassau County is itself a substantially urbanized area with a population of 1.3 million people. Given the community it serves, NCCC faces demands and challenges common to those faced by major metropolitan correctional facilities across the country. It is operational 24 hours a day, 365 days a year. In 1995, over 14,000 inmates were processed into the facility and on any given day approximately 1,800 inmates were housed there. App., 39. To operate the facility,[2] NCCC had approximately 1,100 employees on staff in 1995, in-

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[2] Under the Nassau County Charter, the Sheriff's Department is vested with authority to manage NCCC. Art. XX, Sec. 2003.

cluding 950 corrections officers responsible for maintaining security, order and discipline. *See* App., 39, 51-52. For the corrections officers, each day is divided into three tours. On average, there were 125 corrections officers on duty during each tour in 1995, resulting in an inmate to guard ratio of approximately 14 to one.

The NCCC inmate population includes both pre-trial detainees and convicted criminals. The convict population encompasses those serving terms of one year or less, and those awaiting transfer to upstate prison facilities, usually for more serious offenses. The inmate profile runs the gamut from those charged with minor misdemeanors to those convicted of the most serious violent crimes, such as rape and murder. App., 52. As in any correctional facility, there is a potential for explosive violence among the inmates. Of particular concern is the growing problem of gang infiltration, including the notorious "Crips" and "Bloods" street gangs. *See* App., 52. The security threat posed by gang members was severe enough to prompt the establishment of a special NCCC gang identification unit, to monitor the movements of gang members in an attempt to forestall conflict among the rival factions.

A random examination of NCCC files for the years 1996 and 1997 revealed that on six occasions, inmates were discovered to have either razor blades, a screw driver, a handcuff key, or a metal "shank" during the strip search. *See* App., 52. In addition, narcotics were found on eight occasions. App., 52. The consequences of any penetration of weapons into the facility are potentially lethal to guards and prisoners. Indeed, NCCC corrections officers have been attacked by inmates wielding razor blades, notwithstanding the strip search policy. Moreover, the raw numbers do not reveal the full extent of the need for strip searches. The existence of a strip search policy is itself a deterrent to smuggling. Once it becomes known that misdemeanor arrestees have an

opportunity to introduce contraband, attempts to smuggle weapons and drugs are likely to increase. According to corrections officials, this is especially true in the case of gang members, who may well subject themselves to misdemeanor arrest for the purpose of funneling weapons to their gang associates.

C. NCCC's Strip Search Policy

In order to promote the safety of officers and inmates, NCCC instituted a strip search policy to prevent the influx of weapons and contraband. The written policy is set forth, *inter alia*, in the Nassau County Sheriff's Department Policies and Procedures:

> All inmates admitted or discharged, while in civilian clothes, shall be segregated from other in-residence inmates to prevent possible transfer of contraband. (Rule 8.3)
>
> * * *
>
> The admitting process of new inmates shall include a thorough search of each inmate, to include a strip search and examination of all clothing for contraband, prior to their arrival in the housing area. (Rule 8.4)

As reflected in the rule, a primary purpose of the search is to facilitate examination of the inmate's clothing. The body search involves a strictly visual inspection of the hair, ears, mouth, underarms and rectum. In addition, male prisoners are directed to lift external genitalia for inspection. App., 13. As noted above, the searches are carried out in partitioned cubicles, do not entail physical contact and generally last under two minutes. (According to the officer who searched Mr. Shain, the search took approximately one minute. App., 47.) Male prisoners are searched by male corrections officers and female prisoners by female officers.

D. The District Court's Grant Of Summary Judgment

On July 29, 1996, Mr. Shain commenced an action in the United States District Court for the Eastern District of New York against various defendants including petitioners herein. The suit was brought under 42 U.S.C. Sections 1983 and 1988, and claimed multiple civil rights violations arising out of Mr. Shain's arrest and incarceration. Among his claims was a challenge to the constitutionality of NCCC's strip search policy. Mr. Shain sought both declaratory and injunctive relief, as well as unspecified monetary damages, including punitive damages. *See* App., 14.

While the District Court was "sympathetic to the legitimate security and safety needs expressed by the Nassau County Sheriff" (App., 45), it nevertheless granted plaintiff summary judgment on the unconstitutionality of the strip search policy, based on *Weber v. Dell* and the cases applying it.[3] *Weber* held that:

> [T]he Fourth Amendment precludes prison officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband

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[3] While acknowledging the evidence put forward by NCCC to justify the policy, the District Court determined that "[g]iven the state of the law, however, the Court could not properly consider this evidence." *App., 53. See also id.* at 50: "In light of this precedent [*i.e., Weber v. Dell*], this court is precluded from considering the institutional concerns of the NCCC." However, the District Court noted that:

> a full consideration of the facts surrounding the NCCC and its particular concerns may have resulted in a finding that a one or two minute strip search . . . might well be warranted when balanced against the concerns of this particular institution. *App., 53.*

> based on the crime charged, the particular characteristics of the arrestee and/or the circumstances of the arrest.

804 F.2d at 802.

The District Court found that Nassau County and the Nassau County Sheriff were subject to monetary liability resulting from implementation of the policy.[4] App., 50.

E. The Court of Appeals' Divided Decision

The Court of Appeals affirmed the District Court's determination, also on the strength of the *Weber*-line of decisions. *See Shain, supra*, 273 F.3d at 62-63 (*citing Weber, Walsh v. Franco*, 849 F.2d 66 (2d Cir. 1988) and *Wachtler v. County of Herkimer*, 35 F.3d 77 (2d Cir. 1994)); App., 18.

To reach that result, the Court was compelled to distinguish several cases applying the *Turner* doctrine, including the Second Circuit's own decision in *Covino v. Patrissi*, 967 F.2d 73 (1992), which upheld a prison regulation permitting random strip searches, as well as the decisions of this Court in *Washington v. Harper*, 494 U.S. 210 (1990) and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), both of which were prisoner's rights cases reaffirming the *Turner* analysis. The Court of Appeals determined that:

> *Turner*, *Washington*, *O'Lone* and *Covino* each approved a regulation of a state correctional facility or prison, but NCCC is a local correctional facility or jail. . . . Neither *Turner* nor *Covino* purports to address any issue other than *prison* regulations. Thus these cases can be read

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[4] The District Court granted defendants' motion to dismiss Shain's false arrest, malicious prosecution and abuse of process claims. App., 15. Subsequently, a jury found for defendants on respondent's excessive force claim and awarded no damages for the strip search. The District Court thereafter entered judgment granting Shain nominal damages of one dollar. App., 43a.

> consistently with *Weber* and its progeny by confining them to their facts and actual holdings.

App. 22-23.

Citing Black's Law Dictionary, the majority emphasized the supposed difference in the inmate populations of jails and prisons, declaring that "a prison is 'a state or federal facility of confinement of convicted criminals, especially felons. A jail, on the other hand, is 'a place where persons awaiting trial or those convicted of misdemeanors are confined.'" App., 22. Therefore, the majority reasoned, *Turner* was not controlling. The majority did not acknowledge that NCCC actually houses felons convicted of the major offenses, including crimes of violence, as well as pre-trial detainees and misdemeanants.[5]

Judge Cabranes dissented, based on his belief that the majority opinion "unnecessarily limits the reach of Supreme Court cases in this area" and "requires that correctional facilities such as NCCC be run in a manner that defies common sense." App., 32. He also observed that "our sister Circuits routinely apply *Turner*'s 'reasonably related' standard to cases involving jails." App., 35.

Judge Cabranes would have applied the *Turner* standard to NCCC because it "envisions a flexible multi-factor inquiry . . . [which] would permit administrators to craft body cavity search policies" based on the actual conditions prevailing at the Nassau facility. App., 43. "By contrast," Judge Cabranes noted, the *Weber* standard requires prison administrators to *ignore* these conditions and "focus on only one set of variables — those related to reasonable suspicion itself." App., 43.

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[5] The Court of Appeals remanded the case to the District Court for findings and conclusions regarding plaintiff's request for an injunction against future enforcement of the strip search policy. App., 25.

Circuit Judge Katzmann concurred in the majority opinion, but he too expressed serious reservations about its reasoning. Judge Katzmann believed himself bound by Second Circuit precedent to invalidate NCCC's policy. App., 31. However, with respect to the majority's distinction between jails and prisons and misdemeanors and felonies, Judge Katzmann doubted whether "either is a distinction I would make were I considering the question in the first instance." App., 31.

Reasons for Granting the Petition

Certiorari should be granted to resolve a split in the circuits and settle the important federal question raised in this petition. *See* "Considerations Governing Review on Certiorari," Sup. Ct. R. 10(a) and (c). The simple fact is that the Second Circuit ruling makes jails more dangerous, by making it more difficult for corrections personnel to intercept weapons and drugs. Certiorari is warranted to determine whether the Court of Appeals applied the correct standard when it superseded the professional judgment of corrections officials and struck down NCCC's strip search policy.

Strip searches are a highly sensitive matter. They are undeniably unpleasant for all concerned. Nevertheless, these searches are intended to prevent much graver violations of personal integrity, *i.e.*, violent assault by inmates armed with smuggled weapons or intoxicated with contraband narcotics. Strip searches are not a punishment. They are, in the judgment of professionals responsible for maintaining jail security, an unpleasant necessity, as are jails themselves. Understandably, inmates would generally prefer to avoid strip searches. Yet, inmates are the ultimate beneficiaries of strip search policies, inasmuch as they create a safer custodial environment.

A. There Is A Direct Conflict In The Circuits On Whether *Turner* Applies To "Jails" As Well As "Prisons"

The split in the circuit on this important federal question is clear and irreconcilable. As acknowledged in Judge Cabranes' dissent (but ignored by the majority), other circuits routinely employ the *Turner* test to resolve constitutional disputes involving "jails" (as defined by the Second Circuit) as well as "prisons."

Thus, in *Siddiqi v. Leak*, 880 F.2d 904 (7th Cir. 1989), the Seventh Circuit expressly held that *Turner* "set out the standard" for evaluating the constitutional claims of an inmate of the Cook County Jail. 880 F.2d at 909 *(citing, inter alia, Turner*, 482 U.S. at 89 and *O'Lone*, *supra*, 482 U.S. at 349). No distinction was drawn between jails and prisons.

Likewise, Ninth Circuit decisions consistently apply *Turner* when scrutinizing policies and practices of county jails. For example, *Friend v. Kolodzieczak*, 923 F.2d 126 (9th Cir. 1990) involved a challenge to a policy of the Alameda North County Jail. Implicitly rejecting the semantic distinction embraced by the Second Circuit, the Ninth Circuit characterized the claim as a challenge to "prison regulations" and analyzed it under the *Turner* and *O'Lone* tests. *Id.* at 127. This implicit rejection was made explicit in the subsequent decision in *Mauro v. Arapaio*, 188 F.3d 1054, 1058-62 (9th Cir. 1999) (*en banc*), *cert. denied*, 529 U.S. 1018 (2000), where the Court applied *Turner* to a claim involving the Maricopa County jail system. In his vigorous dissent, Circuit Judge Kleinfeld squarely confronted the *Mauro* Court with the alleged dichotomy between jails and prisons. "'Prisons' and 'jails' are not the same thing," argued Judge Kleinfeld, anticipating the position of the Second Circuit here. *Id.* at

1067. "Jails hold people pending trial, and for short punitive sentences after conviction. Prisons hold people convicted and sentenced to substantial incarceration, ordinarily for felonies. The case before us is a jail case, not a prison case." *Id.*(*citing* Black's Law Dictionary 834, 1194 (6TH ed. 1990)). Therefore, he concluded, *Turner* "is the wrong case," because it exclusively "applies to prisons. . . ." *Id.* Exactly like the Second Circuit here, Judge Kleinfeld cited Black's Law Dictionary to support an asserted Constitutional differentiation between jails and prisons. By rejecting Judge Kleinfeld's position, the Ninth Circuit set the stage for the clean circuit split created by *Shain*.

In addition to the Seventh and Ninth Circuit decisions cited by Judge Cabranes, the Fourth Circuit has also applied *Turner* to local detention facilities. In *Hause v. Vaught*, 993 F.2d 1079 (4th Cir. 1993), *cert. denied*, 510 U.S. 1049 (1994), which involved the constitutional claims of a pre-trial detainee at the Horry County Detention Center in South Carolina, the Fourth Circuit expressly relied on *Turner* as well as *Thornburgh v. Abbott*, 490 U.S. 401 (1989), a subsequent decision applying the *Turner* standard. While acknowledging that these cases "did not involve pretrial detainees . . .," the court reasoned that "the concern for security is the same for pretrial detainees as for convicted inmates." 993 F.2d at 1082. "Accordingly," the Fourth Circuit held, "we shall apply the *Turner* standard to determine the constitutionality of the Detention Center's restrictions. . . ." *Id.*

In short, the Second Circuit says that *Turner* does not apply to jails, while the Fourth, Seventh and Ninth Circuits

say that it does.[6] This Court's intervention is needed to resolve this conflict among the Circuit Courts.[7]

B. The Substantive Standards In *Turner* And *Weber* Are Also In Direct Conflict.

The substantive standards at work in *Weber* and *Turner* conflict on several levels. First, these cases reflect fundamentally opposing views on the proper role of the courts in setting penal policy. *Turner*'s "relatively deferential 'reasonably related'" test recognizes the judiciary's limited institutional competence in the field of prison administration. App., 38. Without abandoning the judicial duty to safeguard individual rights, the *Turner* decision acknowledges that the "complex and intractable" problems which beset American correctional facilities are "'not readily susceptible of resolution by judicial decree.'" App., 38 *(quoting Turner*, 482 U.S. at 85). In the words of *Turner*:

> Running a prison is an inordinately difficult undertaking that requires expertise, planning and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task

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[6] The Sixth and Tenth Circuits too have applied *Turner* to claims involving county correctional facilities, albeit in nonbinding, unpublished opinions. *See Polk v. Parnell*, 1997 U.S. App. LEXIS 34812,*6, No. 96-5711 (6th Cir. December 8, 1997)(involving constitutional claims against officials of the county jail of Fulton County, Kentucky); *Thomas v. Leslie*, 1999 U.S. App. LEXIS 7795, *15-*19 (10th Cir. April 29, 1999) (relying on *Turner* to resolve challenge to regulation of Reno County Detention Center). These opinions are reproduced in the appendix at A-71 and A-54.

[7] Indeed, the Second Circuit's own jurisprudence remains internally conflicted in this area, despite the efforts of the Court below to bring harmony to the case law. As Judge Cabranes pointed out, the majority's holding fails to account for the fact that the Second Circuit has previously applied "*Turner* in a jail setting." App., 37 (*citing United States v. El-Hage*, 213 F.3d 74, 81-82 (2d Cir. 2000)).

> that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. *Id.* at 84-85.

In addition, when a dispute concerns a state or local facility, principles of federalism also come into play. *See id.*: "Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities."

As summed up by Judge Cabranes' dissent, "a basic purpose of the 'reasonably related' standard is to prevent the federal courts from becoming overly involved in the administration of corrections-related facilities that have chronic problems that the judiciary is, comparatively speaking, poorly-positioned to solve." App., 38-39.

In contrast, the Second Circuit endorses a more intrusive judicial role in the affairs of correctional institutions. Rather than defer to the judgment of state corrections officials, the *Weber* standard dictates a bright-line rule which these officials must follow, regardless of the conditions which prevail at their detention facilities. Under no circumstances may local correctional facilities strip-search misdemeanor arrestees without reasonable suspicion. *Weber* thus seeks to impose solutions to perceived correctional problems through judicial decree, the very approach cautioned against in *Turner*.

In comparison to *Turner*, the Second Circuit's approach accords much less weight to the administrative priorities set by those who manage detention facilities. This is demonstrated by the Circuit Court's willingness to discount the security concerns raised by NCCC officials in the case at bar. *See, e.g.*, the Circuit Court's determination that, despite the policy judgment of NCCC officials that a strip search is a necessary precaution for virtually all inmates, "[i]t is far less obvious that misdemeanor arrestees frequently or even

occasionally hide contraband in their bodily orifices." App., 20. *See also* App., 20-22 (rejecting NCCC's conclusion that "arraignment represents a crucial step in the criminal proceedings that justifies heightened security measures.") This inclination to second-guess the judgments and contradict the conclusions of professional penologists is inconsistent with the spirit of *Turner*.

Moreover, the differences between *Turner* and *Weber* are not merely philosophical. The specific legal standards in *Weber* and *Turner* are also not susceptible of reconciliation and the differences in the way they are applied must have a profound impact on prison administration. *Turner* sets forth a flexible balancing test that requires the reviewing court to consider a broad range of factors in assessing the lawfulness of a practice such as the NCCC's strip search policy. It thereby mirrors the decision-making process engaged in by the administrators themselves.

Under *Turner*, prison officials and reviewing courts are free to recognize that institutional conditions may justify a blanket strip search policy, even where individualized suspicion may be absent. The detainee's right to be free from unreasonable search is balanced against the safety and security needs at the particular facility in question. Again as noted by the dissent:

> In determining how this balance should be struck in the context of any particular facility, common sense dictates that a number of factors are relevant, including whether the facility is overcrowded; whether it is equipped with drug-sniffing dogs and metal detectors; whether it has been infiltrated by gangs; and whether prisoners have attempted previously to secrete contraband in a manner detectable only by cavity searches.

App., 43. "By contrast," Judge Cabranes further noted, "the 'reasonable suspicion' standard requires prison administrators

to focus on only one set of variables — those related to reasonable suspicion itself." App., 43. Corrections officials are constitutionally prohibited from considering any of the factors enumerated above — factors which the *Turner* test would leave them free to take into account. Clearly, then, there is a basic discrepancy between the flexible standard in *Turner* and the more rigid *Weber* approach. Because there is a clear split among the Courts of Appeals on this question of considerable importance, this is a fitting case for granting the writ.

C. The Issue of Strip Searches Is A Recurring Question Of Great Practical Importance To Local Corrections Officials

The Court of Appeals decision is of great practical significance to corrections officials because it hampers their ability to maximize safety and security at detention facilities. It rests on the dubious assumption that persons arrested for misdemeanors are unlikely to conceal weapons or narcotics, and that prison authorities are wrong to believe otherwise. It fails to consider that misdemeanor arrestees frequently have a history of more serious criminal violations, including felony convictions. It opens the door for inmates to coerce or cajole others, especially fellow gang members, into smuggling contraband. It does not account for the fact that in the typical jail, there are numerous opportunities for inmates to arrange to receive illicit material, for example, through unmonitored mail and telephone communications, or frequent contact visits. It gives insufficient weight to the fact that strip searches remain the most effective method for detecting contraband. While magnetometers and similar electronic devices are helpful, the technology is not infallible, and is not designed to detect narcotics. Strip searches are therefore an indispensable tool for maintaining a secure prison environment. Exempting an entire class of misdemeanor arrestees from these searches, as the Second Circuit does, compromises their effectiveness and makes jails less safe.

The "difficulty with the majority's holding is that it interprets the Constitution as requiring large, complex facilities such as the NCCC to be run less intelligently — and less safely — than ought to be the case." App., 42 (Cabranes, J., dissenting).

The Second Circuit rule and its unfortunate effects are not restricted to NCCC. Strip search policies have been curtailed at penal institutions throughout the Second Circuit, including the New York City Department of Corrections, the largest municipal detention system in the nation. The strip-search issue, moreover, is a recurring one for local detention facilities. Most recently, the issue surfaced in an July 24, 2002 federal district court opinion, which relied on the Court of Appeals decision to condemn the strip search policy at the Orange County Jail in Orange County, New York. *See Dodge v. County of Orange*, 2002 U.S. Dist. Lexis 13374, No. 02 Civ. 769 (S.D.N.Y. July 24, 2002).

Any weapon that passes into the prison population puts both officers and inmates at risk. Slashings and stabbings are a constant threat. By making the walls of detention facilities more porous for weapons and drugs, the Court of Appeal's decision below has increased these risks.

Conclusion

The petition should be granted.

Respectfully submitted,

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County of Nassau
Attorney for Petitioners
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Mineola, New York 11501
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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K.SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

Mr. Paul F. Millus
Snitow Kanfer Holtzer & Millus
575 Lexington Avenue
New York, NY 10022-6102

Re: Nassau County, et al.
v. Ray E. Shain, et al.
Application No. 01A1004

Dear Mr. Millus:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on June 28, 2002, extended the time to and including October 4, 2002.

This Letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER, Clerk
By /s/ Ruth Jones

Ruth Jones
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-3011

NOTIFICATION LIST

Mr. Paul F. Millus
Snitow Kanfer Holtzer & Millus
575 Lexington Avenue
New York, ny 10022-6102

Clerk
United States Court of Appeals for
the Second Circuit
1702 US Courthouse, Foley Sq.
New York, NY 10007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 7th day of May two thousand two.

RAY E. SHAIN,

Plaintiff - Appellee - Appellant,

v. 00 - 7061

JOHN ELLISON, (Shield No. 761), individually and as Nassau County police officer; JOHN DOE, Individually and as an Assiatant District Attorney of Nassau County; THE COUNTY OF NASSAU, a Municipal Corporation; JOSEPH JABLONSKI,

Defendants - Appellant - Cross-Appellees.

JAMES H. MADDEN, individually and as a Judge of Nassau County,

Defendant-Cross-Appellee.

UNITED STATES COURT OF APPEALS
FILED
NOV. 9, 2001
Roseann B. Mackechnie,
Clerk
SECOND CIRCUIT

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant John Ellison, et al.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, CLERK

By: /s/ AUTHUR M. HELLER
Arthur M. Heller,
Administrative Attorney

Mr. Paul F. Millus
Snitow Kanfer Holtzer & Millus
575 Lexington Avenue
New York, ny 10022-6102

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at theUnited States Courthouse, Foley Square, in the City of New York, on the 19th day of October, two thousand and one.

BEFORE: Hon. Jose A. Cabranes,
Hon. Rosemary S. Pooler,
Hon. Robert A. Katzmann,
Circuit Judges.

Docket Nos. 00-706(L), 007069(XAP)

RAY E. SHAIN,

v. Plaintiff-Appellee-Cross-Appellant,

JOHN ELLISON, (Shield No. 761), individually and as a Nassau County police officer; JOHN DOE, individually and as an Assistant District Attorney of Nassau County; THE COUNTY OF NASSAU, a Municipal Corporation; JOSEPH JABLONSKY,

Defendants-Appellants-Cross-Appellees.

JAMES H. MADDEN, individually and as a Judge of Nassau County,

Defendant-Cross-Appellees.

UNITED STATES COURT OF APPEALS
FILED
NOV. 9, 2001
Roseann B. Mackechnie,
Clerk
SECOND CIRCUIT

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ORDERED, ADJUDGED and DECREED that the Judgment of said district court be and it hereby is AFFIRMED in part and REMANDED to the district court for further proceedings in accordance with the opinion of this Court.

A TRUE COPY
Roseann B. MacKechnie, CLERK

by:/s/_____
Deputy Clerk
FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
by

/s/ ARTHUR M. HELLER
Arthur M. Heller, Administrative Attorney

ISSUED AS MANDATE: 5/7/02

Mr. Paul F. Millus
Snitow Kanfer Holtzer & Millus
575 Lexington Avenue
New York, ny 10022-6102

RAY E. SHAIN, Plaintiff-Appellee-Cross-Appellant, -v- JOHN ELLISON, (Shield No. 761), individually and as a Nassau County police officer; JOHN DOE, individually and as an Assistant District Attorney of Nassau County; THE COUNTY OF NASSAU, a Municipal Corporation; JOSEPH JABLONSKY, Defendants-Appellants-Cross-Appellees, JAMES H. MADDEN, individually and as a Judge of Nassau County, Defendant-Cross-Appellee.

Docket Nos. 00-7061 (L), 00-7069 (XAP)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

October 19, 2000, Argued

October 19, 2001, Decided

COUNSEL:
ROBERT L. HERBST, Herbst & Greenwald, LLP (Gayle Pollack, on the brief), New York, NY; RAY E. SHAIN, Pro se, Williston Park, NY, for Plaintiff-Appellee-Cross-Appellant.

PAUL F. MILLUS, Snitow & Cunningham, LLP (Robert P. Devlin, on the brief), New York, NY, for Defendants-Appellants-Cross-Appellees County of Nassau and Joseph Jablonsky.

CAROL FISCHER, Assistant Solicitor General (Eliot Spitzer, Attorney General of the State of New York, Robert E. Forte, Deputy Solicitor General, and Michael S. Belohlavek, Assistant Solicitor General, on the brief), New York, NY, for Cross-Appellee [**2] Judge James H. Madden.

Herbst & Greenwald, LLP (Robert L. Herbst and Gayle Pollack of counsel), New York, NY, for Amici Curiae Putative Class Members in Augustin v. Jablonsky.

Emery Cuti Brinckerhoff & Abady PC (Richard D. Emery, Matthew D. Brinckerhoff, John R. Cuti, and Nina Morrison, of counsel), New York, NY for Amici Curiae 65,000 Class Members in Tyson v. City of New York and Plaintiffs in O'Day v. Nassau County.

Daniel L. Greenberg, Sarah Kerr, John Boston, Laura Johnson, New York, NY, for Amicus Curiae Legal Aid Society.

Michael D. Hess, Corporation Counsel of the City of New York (Larry A. Sonnenshein and Kathleen Alberton of counsel), New York, NY, for Amicus Curiae New York City Department of Correction.

JUDGES:
Before: CABRANES, POOLER, KATZMANN, Circuit Judges. Judge Katzmann concurs in a separate opinion; Judge Cabranes dissents in part in a separate opinion.

OPINION BY:
POOLER

OPINION:

POOLER, Circuit Judge:

This appeal requires us to determine whether it was clearly established in July 1995 that corrections officers in a local correctional facility could not perform a strip search including a non-intrusive examination of body cavities on an individual arraigned on misdemeanor charges unless the officers had reasonable suspicion that the individual possessed contraband or weapons. We hold that after this court's decisions in *Wachtler v. County of Herkimer,* 35 F.3d 77 (2d Cir. 1994), *Walsh v. Franco,* 849 F.2d 66 (2d Cir. 1988), and *Weber v. Dell,* 804 F.2d 796 (2d Cir. 1986), no law enforcement officer reasonably could have believed that it was permissible to perform such a search absent individualized reasonable suspicion.

BACKGROUND

I. Shain's Arrest and Strip Search

On July 29, 1995, Nassau County police officers including Peter Ellison n1 responded to a 911 call from Dr. Donna Denier, who was then married to plaintiff Ray Shain, at the couple's residence. Denier showed Ellison a recently expired order of protection that required Shain to stay out of her bedroom. When Ellison realized that he could not arrest Shain for violation of the order of protection, he interviewed Denier because

[He] wanted to get a clearer picture of exactly what [Shain] did, to see if [he] could arrest him, if there was another charge that [he] could arrest him on besides the order of protection [and after the interview, he] determined that [he]

could arrest him minus the order of protection, without it.

Ellison testified that Denier told him Shain entered her room and threatened to rape her and that Ellison then believed he had probable cause to arrest Shain. In his police report, Ellison said:

COMP REPORTS AT TIME AND PLACE OF OCCURRENCE LAYING IN HER BED READING WHEN HER HUSBAND ENTERED ROOM. SHE TOLD HIM SEVERAL TIMES TO LEAVE AND HE STATED AGAIN, "I'M GOING TO FUCK YOU". SHE TOLD HIM TO LEAVE AGAIN AND FEARING FOR HER SAFETY SHE LEFT THE ROOM AND CALLED THE POLICE

Denier gave a more expansive account of her conversation with Ellison, claiming that she also told him that Shain previously had threatened her and been out of control and that he had thrown a table at her and swung a lamp at her on prior occasions.

n1 Shain wrongly sued Officer Ellison as John Ellison.

Ellison testified that when he arrested Shain for first degree harassment, a Class B misdemeanor, Shain acted in an agitated manner. Shain himself admitted that he did not turn over a pocket knife when he was asked to empty his pockets. After retrieving the pocket knife, Ellison transported Shain to the police station and "rear-cuffed" him to a manacle in a holding cell. Despite Shain's complaints that he had undergone a spinal fusion as an adolescent and was in severe pain, Ellison refused to take the cuffs off or to front cuff Shain. Ultimately, Ellison and another officer took Shain to the Nassau County Medical Center where a doctor who examined him reported that Shain was experi-

encing muscle spasms and lumbar sprain and ordered that he not be cuffed behind his back. Ellison spent the balance of the night at the central police station.

The next day, Shain appeared before Judge James H. Madden, a District Court judge sitting as a Family Court judge, who arraigned Shain on Denier's family offense petition. Without holding a hearing, Judge Madden remanded Shain to Nassau County Correctional Center ("NCCC") without bond.

Upon Shain's arrival at NCCC, Officer James Dantunono directed him to remove all his clothes and submit to a visual body cavity search. Dantunono looked in Shain's ears, his mouth, his hair and under his arms, and then made him turn around, bend over and spread his buttocks apart with his hands to facilitate a visual inspection of his rectum. Dantunono also directed Shain to hold up his external genitalia for inspection. Shain was again strip searched the next morning before he left to appear in Family Court. When Shain appeared in court, Family Court Judge Norman Feiden released him and allowed him to return to his home. Denier withdrew the Family Court petition on August 7, 1995. However, on or about August 28, 1995, the Nassau County District Attorney's Office filed harassment charges against Shain pursuant to N.Y. Penal Law § 240.26. Subsequently, these charges were dismissed pursuant to an adjournment in contemplation of dismissal.

II. NCCC's Strip Search Policy

Although NCCC claims that it does not subject individuals charged with misdemeanors and minor offenses to a strip search unless it has reasonable suspicion that the arrestees are concealing contraband or they have been remanded to NCCC's custody by a court, the written policies governing strip searches require corrections officers

to strip search each newly admitted inmate. In addition, all of the corrections officials who testified conceded that all newly admitted inmates were strip searched regardless of whether they were judicially remanded. Thus, while arrestees held briefly in holding cells may not have been strip-searched, all arrestees admitted to the jail were.

III. District Court Proceedings

Shain filed his lawsuit in the Eastern District of New York on July 29, 1996. In a second amended complaint dated July 7, 1997, Shain named Ellison; Judge Madden; "John Doe," an assistant district attorney; Joseph Jablonsky, the Sheriff of Nassau County; the County of Nassau and various anonymous corrections officers as defendants and requested damages for false arrest and imprisonment, malicious prosecution, abuse of process, the unconstitutional search of his person, assault and battery, and negligent and intentional infliction of emotional distress. He also sought a declaration that New York State Family Court Act § 155(2), which allowed his overnight incarceration without bail, and NCCC's strip search policy were unconstitutional and an injunction against their enforcement.

On April 16, 1997, by stipulation and order, the district court dismissed all claims against Judge Madden, leaving him as a defendant in name only to permit Shain to continue his challenge to Section 155(2). On January 9, 1998, the district court sua sponte dismissed Judge Madden as a defendant, finding that "plaintiff may not discontinue all claims against Judge Madden yet proceed to use him as a straw man to secure what is, in essence, an advisory opinion as to the constitutionality of § 155(2) of the Act."

On December 31, 1998, defendants moved for summary judgment on all of Shain's claims. Shain cross-moved for partial summary judgment establishing the unconstitu-

tionality of NCCC's strip search policy. In an oral decision, Judge Wexler granted defendants' motion to dismiss Shain's false arrest, malicious prosecution, and abuse of process claims but reserved the excessive force and strip search claims for trial. In a published opinion dated June 1, 1999, Judge Wexler granted Shain partial summary judgment establishing that the strip search policy was unconstitutional and that Jablonsky was not entitled to qualified immunity. *See Shain v. Ellison,* 53 F. Supp. 2d 564 (E.D.N.Y. 1999). More specifically, the court stated:

The policy of strip searching all misdemeanor and minor offense arrestees remanded to the NCCC, without requiring any suspicion that the remanded individual is concealing weapons or other contraband, violates the Fourth Amendment to the United States Constitution.

Id. at 568. The court noted that NCCC presented evidence of security problems that might be triggered by an order prohibiting it from strip searching all arrestees entering the facility but believed itself prohibited from considering this evidence by *Weber v. Dell,* 804 F.2d 796 (2d Cir. 1986) and *Walsh v. Franco,* 849 F.2d 66 (2d Cir. 1988). *See* 53 F. Supp. 2d at 567-68.

A jury heard Shain's excessive force claim and evidence related to damages on the strip search claim. It rejected the excessive force claim and awarded Shain no damages for the strip search. Shain then moved to set aside the verdict and, in the alternative, for a new trial. The court denied Shain's motion and entered a judgment granting Shain $ 1.00 in nominal damages, declaring the strip search policy to be unconstitutional, and dismissing the action on the merits.

Defendants County of Nassau and Jablonsky appealed, arguing principally that (1) the district court erred

by failing to give proper deference to NCCC's security concerns; (2) *Weber* and *Walsh* do not govern this case because NCCC's policy was limited to arrestees who had been judicially remanded; (3) defendants had reasonable suspicion that Shain might be concealing a weapon and thus Shain lacked standing to challenge NCCC's general policy; and (4) Jablonsky was entitled to qualified immunity because the law concerning strip searches of misdemeanor pre-trial detainees was unsettled. Shain, who is an attorney, has submitted two briefs on his cross-appeal. In his counseled brief, Shain defends the district court's strip search holding while arguing that the district court should have granted injunctive relief and a new trial on damages. In his *pro se* brief, Shain contends that the district court erred by failing to grant him summary judgment on his false arrest claim; dismissing the malicious prosecution, abuse of process, and false arrest claims; dismissing his claims against Judge Madden and failing to reach the issue of the constitutionality of Section 155(2); and declining to grant a new trial on the excessive force claim.

Several *Amici Curiae* have submitted briefs on the strip search issue. The New York City Department of Correction, which has a strip search policy similar to NCCC's, seeks reversal of the district court's decision. Class counsel for the plaintiffs in *Tyson v. City of New York,* No. 97 Civ. 3762 (S.D.N.Y.) (JSM), and *O'Day v. Nassau County,* 99-CV-2844 (E.D.N.Y.) (DRH) (ARL) primarily request that the court not retreat from *Weber* and *Walsh* insofar as these decisions apply to pre-arraignment detainees who are the plaintiffs in these two lawsuits. Plaintiff's own counsel, who is also the attorney for the putative class members in *Augustin v. Jablonsky,* 2001 U.S. Dist. LEXIS 10276, CV-00-3126 (E.D.N.Y.) (DRH) (ARL) has submitted a brief on their behalf in opposition to the strip search policy. Finally, the Legal Aid Society, which represents

incarcerated individuals in New York, also has submitted a brief in opposition to NCCC's policy.

DISCUSSION

I. Strip Search Policy

A. Legality and Qualified Immunity

Although it appears likely that NCCC's strip search policy applied to all persons actually admitted to the jail whether they had been arraigned or not, we consider the legality of that policy as it applies to post-arraignment admittees to the jail because Shain himself was a post-arraignment admittee.

Before Officer Dantunono searched Shain in July 1995, we had decided three cases relevant to the issue before us. In *Weber,* we considered a Monroe County Jail policy "calling for strip/body cavity searches of all arrested persons other than those placed in 'holding cells,' which are the cells in which arrestees are sometimes placed when their release on bail is imminent." *Weber*, 804 F.2d at 799. The police arrested plaintiff Ann Weber on misdemeanor charges of making a false complaint and resisting arrest. *See id.* After jail officials booked Weber, they required her to remove her clothing and "expose her body cavities for visual inspection." *Id.* We held "that the Fourth Amendment precludes prison officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest." 804 F.2d at 802. Although the defendants argued that their policy applied only to arrestees who could not make bail and thus were to be admitted to the general prison population, we found it unnecessary to remand for factual findings because "even the more narrowly drawn

policy would be unconstitutional." *Id.* We also rejected defendants' request for qualified immunity because all the circuits that had addressed similar policies had found them to be unconstitutional and because we long had stressed the intrusive nature of body cavity searches. *See* 804 F.2d at 803.

Walsh reaffirmed the *Weber* holding, *see Walsh*, 849 F.2d at 68-69, and *Wachtler* assumed *Weber's* applicability to the post-arraignment strip search of a person charged only with a misdemeanor. *Wachtler,* 35 F.3d at 81-82. We also found in *Wachtler* that the individual defendants were entitled to qualified immunity because the law did not clearly establish whether *Wachtler's* conduct was sufficient to trigger a reasonable suspicion. 35 F.3d at 81-82. However, we reinstated Wachtler's claims against the County of Herkimer pending a fuller development of the record. *See* 35 F.3d at 82. We said with respect to the County:

> If the standard procedure included routine strip-searches of misdemeanor arrestees, absent reasonable suspicion of weapons or contraband, and if no reasonable suspicion concerning Wachtler's possession of such items existed, then Wachtler would prevail.

Id. (citing Weber, 804 F.2d at 802-03).

Defendants contend that *Wachtler* does not indicate clearly that post-arraignment strip searches of persons charged with a misdemeanor are unconstitutional because the parties did not necessarily argue a distinction between pre- and post-arraignment searches. Be that as it may, we recognized that Wachtler had been arraigned and remanded to custody and nevertheless found that a policy that subjected him to a strip search without individualized reasonable suspicion would be unconstitutional. *See* 35 F.3d at 79, 82. Because the unconstitutionality of a post-arraign-

ment strip search absent reasonable cause was necessary to the court's holding in *Wachtler,* we reject defendants' argument.

Defendants next argue that we must not read *Wachtler* to prohibit strip searches of persons arrested for a misdemeanor after they have been arraigned because this reading would conflict with two Supreme Court decisions, *Bell v. Wolfish,* 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979), and *Block v. Rutherford,* 468 U.S. 576, 82 L. Ed. 2d 438, 104 S. Ct. 3227 (1984). In *Bell,* the Supreme Court considered the constitutionality of a policy that subjected pre-trial detainees to strip searches after a contact visit. It reasoned that "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Bell,* 441 U.S. at 546. Quoting *Pell v. Procunier*, 417 U.S. 817, 827, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974), the Court held that "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." 441 U.S. at 548. Applying these principles, the Court upheld a visual, no-contact body cavity search of detainees after contact visits with persons from outside the institution. It said, "assuming for present purposes that ... pretrial detainees ... retain some Fourth Amendment rights upon commitment to a corrections facility, we nonetheless conclude that these searches do not violate that Amendment. The Fourth Amendment prohibits only unreasonable searches, and under the circumstances, we do not believe that these searches were unreasonable." 441 U.S. at 558 (internal citations omitted).

In *Block,* the Supreme Court upheld jail policies prohibiting contact visits by pre-trial detainees and per-

mitting jail authorities to conduct random searches of cells in the absence of their pre-trial detainee occupants. However, its holding rests on a due process analysis and thus adds little to the holding of *Bell. See Block,* 468 U.S. at 590; *see also Weber,* 804 F.2d at 800.

In *Weber,* we said that *Bell* did not "read out of the Constitution the provision of general application that a search be justified as reasonable under the circumstances." *Weber,* 804 F.2d at 800. We also described three factors potentially supporting the determination that the *Bell* plaintiffs had no right to be free of a strip search: they already had been arraigned; they had failed to make bail; and they "had presumably chosen to receive visitors and to enjoy physical contact with them." *Id.* In *Wachtler,* we implicitly held that the mere fact of arraignment did not remove a misdemeanor arrestee from the purview of *Weber* and place him within the ambit of *Bell. See Wachtler,* 35 F.3d at 79, 82. The Wachtler result is not at odds with *Bell.* First, the *Bell* court did not address the issue of whether persons charged only with misdemeanors must be treated differently from persons charged with felonies. n2 Second, and more important, *Bell* authorized strip searches after contact visits, where contraband often is passed. *See Block,* 468 U.S. at 586. It is far less obvious that misdemeanor arrestees frequently or even occasionally hide contraband in their bodily orifices. Unlike persons already in jail who receive contact visits, arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something. For the exceptions - for example, a person who is allowed to visit the bathroom unescorted before an arrest - reasonable suspicion may well exist.

n2 In fact, the Court saw no basis for distinguishing between pretrial detainees and convicted inmates because there is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that

> in certain circumstances they present a greater risk to jail security and order. In the federal system, a detainee is com mitted to the detention facility only because no other less drastic means can reasonably assure his presence at trial. As a result, those who are detained prior to trial may in many cases be individuals who are charged with serious crimes or who have prior records. They also may pose a greater risk of escape than convicted inmates. This may be particularly true at facilities like the MCC, where the resident convicted in mates have been sentenced to only short terms of incarcera tion and many of the detainees face the possibility of lengthy imprisonment if convicted.
> *Bell,* 441 U.S. at 546 n.28 (internal citations omitted).

Finally, defendants argue that arraignment represents a crucial step in criminal proceedings that justifies heightened security measures. In *Block*, the Supreme Court said that "the very fact of nonrelease pending trial ... is a significant factor bearing on the security measures that are imperative to proper administration of a detention facility" because of the ease of obtaining bail or release on one's own recognizance. *Block,* 468 U.S. at 583. The same cannot be said of a misdemeanor arrestee in New York because he *must* be released on his own recognizance or granted bail. *See* N.Y. Crim. Proc. L. § 170.10(7). It is only because Denier proceeded civilly against Shain in Family Court that the judge could hold him without bail and without considering the statutory factors relevant to criminal detainees despite the fact that he was charged only with a misdemeanor. *Compare* N.Y. Fam. Ct. Act § 155(2) *with* N.Y. Crim. Proc. L. § 510.30(2)(a). Although a New York felony defendant's post-arraignment detention may well be an indicator of an increased security risk, a person charged with a misdemeanor who remains in jail in New York after arraignment probably does so because (a) he

cannot afford the bail set; (b) he refuses to post bail; or (c) he was arraigned on a Family Court matter, *see* N.Y. Fam. Ct. Act. § 155, Douglas J. Besharov, Practice Commentary (discussing abuse of Section 155). None of these scenarios creates a reasonable suspicion that the alleged offender has secreted contraband or a weapon.

The dissent, albeit not the defendants or the amicus who supports defendants' position, argues that a separate line of Supreme Court cases employing a different analytical model controls the outcome of this appeal. These cases hold that a reasonable relation to a legitimate penological interest suffices to establish the constitutionality of a *prison* regulation. *Washington v. Harper,* 494 U.S. 210, 223, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990); *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987); *Turner v. Safley,* 482 U.S. 78, 87, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987). Between *Walsh* and *Wachtler,* we employed the *Turner* model to uphold the legality of a strip search that took place in a prison. *Covino v. Patrissi,* 967 F.2d 73 (2d Cir. 1992). Covino, who had been charged with kidnapping a child under the age of sixteen, *id.* at 74 n.1, was housed in a state correctional facility where he was commingled with sentenced inmates. *Id.* at 75. We upheld the pertinent regulation, which allowed random strip searches of inmates, despite Covino's pretrial detainee status because the regulation was "reasonably related to legitimate penological interests." *Id.* at 78 and n.4. *Turner, Washington, O'Lone* and *Covino* each approved a regulation of a state correctional facility or prison, but NCCC is a local correctional facility or jail. A prison is"[a] state or federal facility of confinement for convicted criminals, especially felons." BLACK'S LAW DICTIONARY 1213 (7th ed. 1999). A jail, on the other hand, is "[a] place where persons awaiting trial or those convicted of misdemeanors are confined." Id. at 838. This

distinction is reflected in New York where state correctional facilities, commonly referred to as prisons, house those convicted of the most serious crimes and local correctional facilities or jails house persons convicted of minor crimes and pre-trial detainees. See N.Y. Crim. Proc. L. § 430.20(2),(3); N.Y. Penal L. § § 70.00(1), 70.15.

Despite the limitation of *Turner, Washington, O'Lone,* and *Covino* to prison regulations and the substantial difference between jail and prison populations, the dissent contends that *Turner* implicitly overruled *Weber.* We disagree. We start with the proposition that we have "no authority to depart from Second Circuit precedent, unless it has been overruled in banc or by the Supreme Court." *Leecan v. Lopes,* 893 F.2d 1434, 1443 (2d Cir. 1990). Additionally, we should not lightly assume that two prior cases of this court are inconsistent, and we must accept a plausible reading of a case that renders it consistent with other Second Circuit precedent even where an alternative reading exists. *See, e.g., Rocket Jewelry Box v. Noble Gift Packaging,* 157 F.3d 174, 176 (2d Cir. 1998). Neither *Turner* nor *Covino* purports to address any issue other than prison regulations. Thus, these cases can be read consistently with *Weber* and its progeny by confining them to their facts and actual holdings. n3 The dissent's arguments for "assuming that when the *Turner* Court developed the 'reasonably related' standard, it intended for it to apply to facilities like NCCC" may be relevant to whether the *Turner* line of cases should be extended to jails by the Supreme Court, but they are not relevant to the question of whether *Turner* overruled *Weber.* **[Dissent, *infra,* at 8]**

n3 A panel of this court recently stated in dicta that "peno logical interests are ... arguably not an appropriate guide for the pretrial detention of accused persons" because penologi-

cal interests relate to convicted persons. *Benjamin v. Fraser,* 2001 U.S. App. LEXIS 19666, No. 00-9093, 00-9095, 2001 WL 1012247, * 9 n.10 (2d Cir. Sept. 5, 2001). Because we applied *Turner* to the rights of a pretrial detainee who had been charged with a serious crime and who was commingled with sentenced inmates in a state prison in *Covino*, we do not rely solely on Shain's status as a pretrial detainee.

The district court therefore correctly held that because it was clearly established in 1995 that persons charged with a misdemeanor and remanded to a local correctional facility like NCCC have a right to be free of a strip search absent reasonable suspicion that they are carrying contraband or weapons, Jablonsky was not entitled to qualified immunity. The illegality of the sheriff's policy also provides the necessary basis for affirming the County's liability. *See Weber,* 804 F.2d at 803 (holding Monroe County liable for strip search policy implemented by its sheriff).

B. Standing

Even assuming the illegality of NCCC's policy, defendants argue that Shain cannot complain because NCCC had reasonable suspicion concerning him based on the court remand and on facts known by law enforcement personnel other than Dantunono, the officer who actually performed the strip search. We disagree. Although searching officers may rely on information provided to them by their colleagues, *see Velardi v. Walsh,* 40 F.3d 569, 574 (2d Cir. 1994), there is no evidence that Ellison, who was employed by the Nassau County Police Department, or the officers who accompanied Shain to and from court, communicated any information to Dantunono. Thus, the only information Dantunono knew and the only fact NCCC required for a strip search was the fact of the remand. n4 This remand merely required NCCC to receive and detain Shain

until his Family Court appearance and indicated that Shain had been charged under Article 8 of the Family Court Act. Because Article 8 covers offenses ranging from disorderly conduct to assault, the remand itself could not provide reasonable and individualized suspicion. In fact, Lieutenant John Considine, commanding officer of NCCC's operations unit, conceded that the information in Shain's file would not have provided reasonable suspicion that he possessed contraband.

> n4 As noted previously, we accept for the sake of argument that NCCC did require a judicial remand, although the evi dence appears to establish that it did not.

C. The Injunction

Although plaintiff requested an injunction against future enforcement of the blanket strip search policy, the district court judgment neither explicitly granted nor denied this request. Plaintiff's attorney objected to the proposed judgment, in part, on the basis that it did not address the injunction. Plaintiff now claims that the district court erred by failing to grant an injunction once the illegality of the strip search procedure was established. Defendants respond that the district court did not err because NCCC voluntarily suspended its policy pending appeal. However, the record before us is not adequate to determine whether injunctive relief is necessary, and the district court did not make findings of fact or conclusions of law relevant to the grant or denial of injunctive relief. Therefore, we remand to allow the district court to make the necessary findings and conclusions. *See* Fed. R. Civ. P. 52(a).

D. Refusal of New Trial on Damages

In his charge, the district judge instructed the jury

that if it found defendants had violated Shain's constitutional rights but he had not suffered a compensable injury, it should award nominal damages not to exceed one dollar. The judge also instructed the jury that he previously had found defendants' strip search policy to be unconstitutional. When the jury returned its verdict, the court asked what compensatory and punitive damages the jury had awarded on the strip search claim and the foreman responded "Zero." The judge did not ask what nominal damages the jury had awarded. Plaintiff then moved to set aside the verdict and for a new trial, and the court denied both motions. However, the court did enter a nominal damages judgment of one dollar. On appeal, Shain argues only that the court should have granted him a new trial on damages.

We review a district court's decision not to grant a new trial on damages solely for abuse of discretion. *See Amato v. City of Saratoga Springs,* 170 F.3d 311, 314 (2d Cir. 1999). The district court should not grant such a motion "unless [it] is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *Id.* (internal quotation marks omitted). Shain cannot meet this high standard. He produced no objective medical or psychological testimony linking a psychological or physical injury to the strip search, and although he and his former girl friend testified that he was emotionally traumatized by the search, the jury was not required to credit this testimony. *See id.* at 314-15. Nor was it error for the court to correct the jury's verdict by entering a nominal damages award of one dollar since nominal damages are appropriate for the violation of a constitutional right. *See Dawes v. Walker,* 239 F.3d 489, 497 (2d Cir. 2001) (collecting cases holding that it is error not to award nominal damages where a constitutional violation is established).

II. False Arrest

In order to make out a New York common law or Section 1983 claim for false arrest or imprisonment, plaintiff must demonstrate that defendant intended to confine him, he was conscious of the confinement, he did not consent to the confinement, and the confinement was not otherwise privileged. *See Singer v. Fulton County Sheriff,* 63 F.3d 110, 118 (2d Cir. 1995). An arrest made on probable cause is privileged, and probable cause exists "when the arresting officer has knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." *Id.* at 119 (internal quotation marks omitted). The officer may rely on the victim's allegations. *See Martinez v. Simonetti,* 202 F.3d 625, 634 (2d Cir. 2000).

New York Penal Law § 240.25, which defines first degree harassment, states in relevant part:

A person is guilty of harassment in the first degree when he or she intentionally and repeatedly harasses another person by following such person in or about a public place or places or by engaging in a course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury.

Ellison's report of the incident stated that Denier told him Shain entered her bedroom, refused several requests to leave, and threatened to rape her. n5 We find that Shain's alleged refusal to leave the room after repeated requests coupled with his alleged threat to rape Denier constituted a course of conduct that could reasonably have caused Denier to fear for her safety. *See People v. Murray,* 167 Misc. 2d 857, 861, 635 N.Y.S.2d 928 (N.Y. Crim. Ct.

1995) (finding course of conduct within the meaning of the harassment statute where "defendant walked along side the complainant to her office, barred her way when she sought to escape inside [and] continued to stalk her as she retreated up the street [and] forcibly prevented her from obtaining assistance from [a] parked van" although the conduct only lasted five to eight minutes). Therefore, we affirm the district court's dismissal of Shain's false arrest claim.

n5 We adopt Ellison's account rather than Denier's more expansive description because the false arrest claim was dismissed on a motion for summary judgment.

III. Malicious Prosecution

In order to sustain a claim for malicious prosecution, Shain must demonstrate, among other things, that the prosecution terminated in his favor. *See, e.g., Murphy v. Lynn,* 118 F.3d 938, 947 (2d Cir. 1997). Because an adjournment in contemplation of dismissal is not considered to be a favorable termination, Shain cannot sustain his malicious prosecution claim based on the criminal proceeding. *See id.* at 949. Nor can Shain rely on Denier's withdrawal of her Family Court petition because Denier is not a defendant in this lawsuit. We therefore affirm the district court.

IV. Abuse of Process

"[A] malicious abuse of process claim lies against a defendant who (1) employs regularly issued legal process to compel performance or forbearance of some act (2) with intent to do harm without excuse or justification, and (3) in order to obtain a collateral objective that is outside the legitimate ends of the process." *Cook v. Sheldon,*

41 F.3d 73, 80 (2d Cir. 1994). Bringing a defendant before a judge for arraignment satisfies the first element. *See id.* To show improper motive, Shain relies on Ellison's testimony that he knew Denier from the hospital and that after he found the order of protection had expired, he interviewed her further to determine whether there was another basis to arrest Shain. These allegations do not show intent to do harm without excuse or justification. Ellison's superficial acquaintance with Denier hardly suggests improper motive, and his continuance of the investigation when he found the order of protection had expired was merely good police work. The district court properly dismissed this claim.

V. Excessive Force

Shain contends that he also is entitled to a new trial on his excessive force claim principally because the court instructed the jury that Ellison could use sufficient force to arrest Shain. As we have found that Ellison did have probable cause to arrest Shain, the charge was not erroneous. *See Calamia v. City of New York,* 879 F.2d 1025, 1034-35 (2d Cir. 1989). Shain also argues that the court abused its discretion by admitting Denier's testimony concerning his past abuse and her account of this abuse to Ellison. However, what Denier told Ellison was relevant to the jury's determination of whether Ellison used excessive force by rear cuffing Shain. Therefore, the district court did not abuse its discretion.

VI. Judge Madden and Section 155(2) Claim

The parties stipulated to dismiss all claims against Judge Madden but to keep him as a nominal defendant for the purpose of testing the constitutionality of Family Court Act § 155(2). The district court initially "so ordered" this stipulation but later dismissed the claims against Judge Madden in their entirety without directly ruling on

plaintiff's claim that Section 155(2) is unconstitutional. The district court did not err because (1) at the time the court issued its *sua sponte* order (1) there was no realistic danger that Shain would face the same harm again and (2) there was no defendant against whom Shain could have recovered damages. Denier withdrew her Family Court petition on August 7, 1995, and there is no allegation that she ever filed another one. By the time Judge Wexler issued his order, the parties had been divorced for over a year. Because Shain could not show "that these same parties are reasonably likely to find themselves again in dispute over the issues raised in this appeal," he lacked a legally cognizable stake in seeking an injunction or a declaratory judgment. *Muhammad v. City of New York Dep't of Corrections,* 126 F.3d 119, 124 (2d Cir. 1997) (internal quotation marks omitted). Nor could Shain have obtained damages from any of the defendants because Judge Madden is protected by judicial immunity, see Stump v. Sparkman, 435 U.S. 349, 364, 55 L. Ed. 2d 331, 98 S. Ct. 1099 (1978), and the remaining defendants bore no responsibility for Shain's continued incarceration after the judicial remand.

CONCLUSION

We affirm the district court's judgment except as to the failure to rule explicitly on Shain's request for injunctive relief against NCCC's strip search policy. With respect to that policy, we remand to the district court for further proceedings in accord with this opinion.

CONCUR BY:
ROBERT A. KATZMANN

CONCUR:

ROBERT A. KATZMANN, concurring:

I join in Judge Pooler's opinion in this challenging case. Unlike Judge Cabranes in his thoughtful dissent, I believe it reaches the result required by the precedent of this Circuit with respect to the standard to be applied to cavity searches in cases such as this one. In short, *Turner v. Safley,* 482 U.S. 78, 89-90, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987), and its progeny deal with prison regulations as they are applied to individuals charged with or convicted of felonies, while *Weber v. Dell,* 804 F.2d 796 (2d Cir. 1986), *Walsh v. Franco,* 849 F.2d 66 (2d Cir. 1988), and *Wachtler v. County of Herkimer,* 35 F.3d 77 (2d Cir. 1994), concern the treatment of misdemeanor arrestees being held in jails. Because there has been no explicit indication from the Supreme Court that it would apply its "reasonably related to penological interests" standard (rather than a "reasonable suspicion" standard) to cases involving misdemeanor arrestees being held in jail, I believe we are compelled to follow Circuit precedent, which distinguishes between these two types of cases. As *Wachtler* was decided well after *Turner,* it appears to me that this Circuit's approach to such cases is unchanged after *Turner.* I write separately to emphasize that while this Circuit's choice to distinguish for these purposes either between misdemeanors and felonies or between jails and prisons is not necessarily persuasive to me - and in fact I am not sure either is a distinction I would make if I were considering the question in the first instance - I do think that these distinctions are required by our earlier precedents. Because these precedents have not, in my view, been squarely overruled, I believe we have no choice but to apply the "reasonable suspicion" standard to the facts of this case.

DISSENT BY:
JOSE A. CABRANES (In Part)

DISSENT:

JOSE A. CABRANES, *Circuit Judge,* dissenting in part:

I respectfully dissent from the majority's decision to evaluate the constitutionality of the cavity search at issue here under the "reasonable suspicion" standard we developed in *Weber v. Dell,* 804 F.2d at 802 (2d Cir. 1986), rather than under the "reasonably related to legitimate penological objectives" standard subsequently articulated by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89-90, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987).

In reaching this decision, the majority subjects Nassau County to liability for having an assertedly unconstitutional cavity-search policy, and subjects an individual defendant to liability for implementing it. Moreover, the majority remands the cause for a determination as to whether the District Court should enjoin the Nassau County Correctional Center ("NCCC") from continuing to conduct a cavity search of all people admitted to the facility.

The majority's decision is based on an artificial, untenable distinction between "prisons" and "jails," and creates a Circuit split where there was none—a Circuit split that calls out for resolution by the Supreme Court. In my view, the majority's decision finds no warrant in the Supreme Court's jurisprudence and, indeed, substantially and unnecessarily limits the reach of the leading Supreme Court cases in this area. In resolving the cavity-search issue as it does, the majority also requires, by what the majority holds are the dictates of the Constitution, that correctional facilities such as the NCCC be run in a manner that defies common sense.

Accordingly, I dissent from the holding that the applicable standard to evaluate the constitutionality of a cavity search in a jail is "reasonable suspicion" rather than

"reasonably related to a legitimate penological interest." n1 I write briefly to explain why.

> n1 I agree with the majority as to its disposition of plaintiff-appellee-cross-appellant Ray E. Shain's false arrest, malicious prosecution, abuse of process, and excessive force claims, as well as with its disposition of his challenge to the constitutionality of the Family Court Act § 155(2). As to these issues, I concur in the reasoning and result of the majority opinion.

As the majority notes, in *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986), we developed a standard for assessing the constitutionality of cavity searches of arrestees: The Constitution, we held, "precludes prison officials from performing ... cavity searches of *arrestees charged with misdemeanors or other minor offenses* unless the officials have a *reasonable suspicion* that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest." 804 F.2d at 802 (emphasis added). In *Walsh v. Franco,* 849 F.2d at 68-69 (2d Cir. 1988), and *Wachtler v. Herkimer* County, 35 F.3d at 81 (2d Cir. 1994), we evaluated the constitutionality of cavity searches under *Weber's* "reasonable suspicion" standard.

Nearly one year after our decision in *Weber,* the Supreme Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley,* 482 U.S. at 89-90, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987); *see also Washington v. Harper*, 494 U.S. at 224, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990) (holding, *inter alia,* that "*Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights"); *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 348, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987) (apply-

ing *Turner* and noting that "legitimate penological interests" include "deterrence of crime, rehabilitation of prisoners, and institutional security"). In *Covino v. Patrissi,* 967 F.2d 73 (2d Cir. 1992), we evaluated a cavity search under *Turner's* "reasonably related" standard, and held that an arrestee may, in some circumstances, be subjected to a cavity search "in the absence of an ... individualized suspicion justifying the search," 967 F.2d at 77-78—that is, even when there is no "reasonable suspicion" of the kind required by *Weber.*

The question here is this: Should we assess the constitutionality of the NCCC's cavity search policy ("policy") under *Weber's* "reasonable suspicion" standard (a standard we set forth) or under *Turner's* "reasonably related" standard (a standard the *Supreme Court* set forth)?

The answer to this question, thus posed, seems obvious enough—*Turner,* as a case decided by the Supreme Court, must prevail. But resolving the question is complicated by the fact that, regrettably, our cases decided after *Turner* pull in different directions: *Walsh* and *Wachtler* suggest that *Weber's* "reasonable suspicion" standard is controlling here, and *Covino* suggests that *Turner's* "reasonably related" standard is governing.

The majority sidesteps this difficulty by holding that the "reasonably related" standard is controlling where the relevant correctional facility is a "prison" (as was assertedly the case in *Covino*), and that we must apply the "reasonable suspicion" standard that we enunciated in Weber and its progeny where the relevant correctional facility is a "jail" (as was assertedly the case in *Weber, Walsh, Wachtler,* and, as the majority states, here). *See* MAJORITY OPINION, ante, at 14.

At first glance, ordering our cases in this manner is appealing: As a general matter, it is the duty of panels reasonably to harmonize our precedents, *see, e.g., Rocket Jew-*

elry Box, Inc. v. Noble Gift Packaging, Inc., 157 F.3d at 176 (2d Cir. 1998) ("Every panel of this court is bound by the decisions of earlier panels ...."), and the jail/prison distinction renders our caselaw internally coherent by shoehorning all-but-contradictory lines of precedent into apparently distinct doctrinal categories.

However, the distinction between these categories is illusory, and I believe that organizing our caselaw along the jail/prison axis is error.

As an initial matter, the distinction drawn by the majority between jails and prisons is wholly unprecedented. The majority points to no cases that differentiate between jails and prisons in the manner that it suggests, and our sister Circuits routinely apply *Turner's* "reasonably related" standard to cases involving jails. n2

> n2 *See, e.g., Mauro v. Arpaio,* 188 F.3d 1054, 1058-63 (9th Cir. 1999); *Friend v. Kolodzieczak,* 923 F.2d 126, 127-28 (9th Cir. 1991); *Siddiqi v. Leak,* 880 F.2d 904, 908-10 (7th Cir. 1989); *see also, e.g., Rogers v. Arbisi,* 1996 U.S. Dist. LEXIS 2278, No. 93 C 20237, 1996 WL 89346, at *5 (N.D. Ill. Feb. 28, 1996); *Muhammad v. City of N.Y. Dept. of Corrections,* 904 F. Supp. 161, 197 (S.D.N.Y. 1995); *Shaheed v. Winston,* 885 F. Supp. 861, 867-68 (E.D. Va 1995), *aff'd on other grounds* 161 F.3d 3 (4th Cir. 1998) (table); *Pippins v. Adams County Jail,* 851 F. Supp. 1228, 1234 (C.D. Ill. 1994).

They do so with good reason: There is no basis in the Supreme Court's jurisprudence for limiting *Turner's* "reasonably related" standard to cases involving correctional institutions denominated "prisons." It is true, of course, that the "reasonably related" standard nominally applies to "prison regulations." *See Turner,* 482 U.S. at 89

(emphasis added). But the term "prison" is most frequently used generically to describe *any* government facility—including a "jail"—that function primarily as a place for the confinement of people involved in the criminal justice system. *See* BLACK'S LAW DICTIONARY 1194 (6th ed. 1990) ("prison," first definition: "A public building or other place for the confinement of persons, whether as a punishment imposed by the law or otherwise in the course of the administration of justice") (emphasis added). n3

> n3 To be sure, "prison" is sometimes used in a manner that suggests a contrast with a "jail." *See* BLACK'S LAW DICTIONARY 1194 (6th ed. 1990) ("prison," third definition: "institutions ... distinguished from ... jails"). But that is relatively rare. It is more common to treat "jail" and "prison"—both of which are non-technical terms to everyone other than students of penology—as virtual synonyms. *See id.* (defining "prison" in a manner that encompasses "jail"); *id.* at 834 ("jail," first non-"obsolete" definition: "prison"). Consider, for example, *Weber*. In the majority's typology, *Weber* concerns jails, not prisons. But we held there that "*prison* officials" may not take certain actions. *Weber,* 804 F.2d at 802 (emphasis added); *see also* 804 F.2d at 804 (describing the need "to defer to the judgment of prison officials") (emphasis added). Any possible distinction between prisons and local jails apparently did not make an impression on the *Weber* panel, and, as the definitions quoted above suggest, the *Weber* panel's conflation of jail and prison is not merely a matter of linguistic imprecision. Rather, "jail" and "prison" are all-but interchangeable.

This said, to the extent that there is a sharp, commonly agreed upon distinction between the terms, it is that prisons hold people convicted of crimes, and jails hold people merely charged with crimes. *See* BLACK'S LAW DICTIONARY at 834 (defining "jail"). But here, prisons and jails cannot be differentiated on this basis. The majority distinguishes *Covino,* in which we applied *Turner's* "reasonably related" standard, as a case that involved a prison,

not a jail. *See* MAJORITY OPINION, ante, at 14-15. But the plaintiff in-that case had not been convicted of a crime when he was searched—he had merely been charged with a crime. *See Covino,* 967 F.2d at 78 n.4. Accordingly, if "prison" means a correctional facility that houses those convicted of crimes,as the majority suggests, *Covino* would have been a "jail" case, not a "prison" case, and we would have applied *Weber's* "reasonable suspicion" standard. But we did not do so; instead, we applied *Turner's* "reasonably related" standard. *See Covino,* 967 F.2d at 77-78; *accord United States v. El-Hage,* 213 F.3d 74, 81-82 (2d Cir. 2000) (applying the *Turner* standard in a "jail" setting—that is, to assess a pre-trial detainee's constitutional claim).

There is no indication that the *Turner* Court intended to depart from this well-settled, non-technical meaning of the word "prison."

First, *Turner's* "reasonably related" standard, which, as noted, concerns "prison regulations," was itself based on four cases that concerned "prisoners' rights," *see Turner,* 482 U.S. at 86: (1) *Pell v. Procunier,* 417 U.S. 817, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974), (2) *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119, 53 L. Ed. 2d 629, 97 S. Ct. 2532 (1977), (3) *Bell v. Wolfish,* 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979), and (4) *Block v. Rutherford,* 468 U.S. 576, 82 L. Ed. 2d 438, 104 S. Ct. 3227 (1984). *See Turner,* 482 U.S. at 86-89 (discussing these cases). Of these "prisoner's rights" cases, one case—*Procunier*—concerned what the majority would call a "prison"; but another—*Jones*—involved both a prison and a jail, *see Jones,* 433 U.S. at 122, and two of them—*Block* and *Bell*—exclusively concerned jails, *see Block,* 468 U.S. at 578-79, *Bell,* 441 U.S. at 524. This suggests that there is no distinction of constitutional magnitude between jails and prisons. If there were such a distinction, the *Turner*

Court would not have elided the difference between "jail" cases and "prison" case by characterizing certain "jail" cases (*Block, Bell,* and perhaps *Jones*) as "prisoners' rights" case. *See Turner,* 482 U.S. at 86. And similarly, the *Turner* Court would not have—indeed, could not have—derived from "jails" cases (*Block, Bell,* and perhaps *Jones*) a standard that does not apply to them, but that applies only to what the majority would term a "prison" case.

Second, it is clear from *Turner's* rationale that the "reasonably related" standard was not intended to apply only to those institutions encompassed in the majority's narrow definition of "prison." The *Turner* Court adopted the relatively deferential "reasonably related" standard as a means of accommodating two distinct imperatives—first, protecting individual rights; and second, recognizing that "the problems of prisons in America are complex and intractable, and ... are not readily susceptible of resolution by [judicial] decree." 482 U.S. at 85. As the *Turner* Court explained:

> Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have ... additional reason to accord deference to the appropriate prison authorities.

Id. at 84-85. In other words, a basic purpose of the "reasonably related" standard is to prevent the federal courts from becoming overly involved in the administration of

corrections-related facilities that have chronic problems that the judiciary is, comparatively speaking, poorly-positioned to solve. n4

> n4 *See Washington,* 494 U.S. at 223-24 (stating that adoption of the "reasonably related" standard in *Turner* "was based upon the need to reconcile our longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration"); *cf. Turner*, 482 U.S. at 89 ("Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision mak ing process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby unnecessarily perpetuating the involvement of the federal courts in affairs of prison administration.") (internal citations and quotation marks omitted).

But facilities that fit this description are as likely to be denominated "jails" as "prisons." The NCCC is an apt example. It operates 365 days a year and 24 hours a day. When Mr. Shain was subjected to a cavity search there, the NCCC employed 950 corrections officers and housed, on an average day, 1,800 inmates. Every year, more than 14,000 people are introduced into the NCCC population. Of those who are housed at the NCCC, some have been sentenced to terms of one year or less; some have been sentenced to longer terms of imprisonment and are awaiting transfer to state-run correctional facilities in upstate New York; and others have been charged with a range of crimes, including violent felonies.

In short, the NCCC is a large, complex facility. Running it undoubtedly "requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government," and it is therefore reasonable to assume that its problems, whatever they might be, are not "readily susceptible of resolution by [judicial] decree." *Turner,* 482 U.S. at 84-85.

Accordingly, the rationale for the "reasonably related" standard applies as forcefully to the NCCC as it would to a facility formally called a prison, and we must therefore assume that when the *Turner* Court developed the "reasonably related" standard, it intended for it to apply to facilities like the NCCC. But by introducing an artificial distinction between prisons and jails, the majority substantially limits *Turner's* reach—and removes institutions like the NCCC from the ambit of the "reasonably related" standard. n5

> n5 As noted, by distinguishing our cases along a jail/prison axis, the majority hopes to reconcile our precedents with one another. *See ante* at [3]. In this case, however, we need not attempt to do so. As a matter of logic, our application of *Weber's* "reasonable suspicion" standard in *Walsh* and *Wachtler* necessarily rested on a *sub silentio* holding that our decision in *Weber* survived the Supreme Court's subsequent decision in *Turner.* (I characterize this holding as sub silentio because neither *Walsh* nor *Wachtler* mention *Turner,* and there is no indication that the parties brought *Turner* to the attention of the *Walsh* or *Wachtler* panels.) But *sub silentio* holdings do not bind subsequent panels. *See, e.g., Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 49 (2d Cir. 2000); *Getty Petroleum Corp. v. Bartco Petroleum Corp.,* 858 F.2d 103, 113 (2d Cir. 1988). *See generally Webster v. Fall,* 266 U.S. 507, 511, 69 L. Ed. 411, 45 S. Ct. 148 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be

considered as having been so decided as to constitute precedents."). Moreover, when a panel bases a decision entirely on Circuit precedent that has been implicitly overruled by the Supreme Court—as I believe *Weber* was by *Turner*—panels of our Court need not hew to the panel decision. *See, e.g., Zervos v. Verizon,* 252 F.3d 163, 167 (2d Cir. 2001) (collecting cases).

The majority justifies its formalistic cabining of *Turner*—and its concomitant holding that it is *Weber's* "reasonable suspicion" standard that applies in jails—by reference to the "substantial difference between jail and prison populations." MAJORITY OPINION, ante, at 14. However, factors such as the composition of a facility's population—or, indeed, the composition of the portion of a facility's population subjected to a particular regulation—are fully amenable to analysis under the *Turner* standard. *See, e.g., Covino,* 967 F.2d at 79 (stating that "the nature of [the facility's] inmate population" supported the finding that there was "a legitimate and rational connection between the challenged searches ... and [the facility's] security interests"); *Michenfelder v. Sumner,* 860 F.2d 328, 332-33 (9th Cir. 1988) (noting, while upholding visual body-cavity searches of inmates housed in a facility's maximum security unit each time a prisoner entered or left his cell, that "the searches are conducted on convicted prisoners in [the facility's] most restrictive unit" and "elevated security precautions are justified for prisoners placed in maximum security settings ... "). Indeed, because *Turner* requires that the interest identified by the government be "legitimate" and that there be a nexus between the restriction of a prisoner's constitutional rights and the interest, *see* 482 U.S. at 89-90, facility regulations justified by penological goals applicable only to persons convicted of crimes—such as punishment—could not be imposed on pretrial detainees. In this case, however, the NCCC's as-

serted interest is facility security, which is a legitimate concern regardless of the status of the facility's population. *See Mauro v. Arpaio,* 188 F.3d at 1059 & n.1 (9th Cir. 1999) (*en banc*). n6

> n6 In expressing "doubt" in *dicta* over whether the use in *Turner* of the phrase "penological interests" limits its applicability to "persons convicted of crimes," the panel in *Benjamin v. Fraser,* 2001 U.S. App. LEXIS 19666, No. 00-9093, 2001 WL 1012247 (2d Cir. Sept. 5, 2001), cited Judge Kleinfeld's dissent from the en banc decision in *Mauro.* 188 F.3d 1054, 2001 WL 1012247, at *9 n.10. Judge Kleinfeld, in turn, relied on a narrow definition of "penological" as "relating to the 'theory and practice of prison management and criminal rehabilitation'" and meaning, "roughly," "penalty or punishment." 188 F.3d at 1068. Judge Kleinfeld found support for his belief that the Supreme Court used "penological" in this narrow sense in its recognition in *Turner* that rehabilitation is a legitimate penological interest. *Id.* at 1068 & n.8 (*citing Turner,* 482 U.S. at 97-99). Judge Kleinfeld's analysis, however, fails to account for the reliance in *Turner* of facility security as the "penological interest" justifying aprohibition on inmate correspondence between institutions, *see Turner,* 482 U.S. at 91-92, which reliance is inconsistent with his theory that "penological interests" are interests applicable only to prison ers convicted of crimes—after all, facilities housing prison ers may have legitimate security concerns regardless of whether those prisoners have yet been convicted of a crime. Indeed, the majority opinion in *Mauro,* in which the Ninth Circuit distinguished between penological interests that may be legitimately applied to pretrial detainees from those that may be legitimately applied only tothose convicted of crimes, *see* 188 F.3d at 1059 & n.1, demonstrates the appropriate use of the *Turner* multi-factor framework to a regulation affecting pretrial detainees. *See* 188 F.3d at 1058-63.

Another difficulty with the majority's holding is that it interprets the Constitution as requiring large, complex facilities such as the NCCC to be run less intelligently—

and less safely—than ought to be the case. In deciding whether and under what circumstances to permit cavity searches, responsible correctional officials would presumably balance the rights of prisoners (which are impinged on by cavity searches) and the safety of staff and other prisoners (which is enhanced—at least somewhat—by cavity searches). In determining how this balance should be struck in the context of any particular facility, common sense dictates that a number of factors are relevant, including whether the facility is overcrowded; whether it is equipped with drug-sniffing dogs and metal detectors; whether it has been infiltrated by gangs; and whether prisoners have attempted previously to secrete contraband in a manner detectable only by cavity searches. Because the "reasonably related" standard envisions a flexible, multifactor inquiry, *see Turner,* 482 U.S. at 89-91, it would permit administrators to craft cavity search policies with an eye to each of these concerns.

By contrast, the "reasonable suspicion" standard requires prison administrators to focus on only one set of variables—those related to reasonable suspicion itself. Accordingly, the majority's application of the "reasonable suspicion" standard to jails means that administrators who manage facilities such as the NCCC will not be allowed to take into account any of the factors noted above. That makes no sense and, as I have argued, is not required by the Constitution.

The majority holds that we must assess the constitutionality of the cavity search at issue here under *Weber's* "reasonable suspicion" standard, not *Turner's* "reasonably related" standard. For the reasons stated above, I dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

RAY E. SHAIN, 96 Civ. 3774 (LDW)

Plaintiff,

-against-

JOHN ELLISON,(shield No. 761), individually and as Nassau County Police Officer, JOHN DOE, individually and as an Assistant District Attorney of Nassau County, Joseph Jablonsky, individually and as the Nassau County Sheriff, Richard Roe, individually and as Nassau County Corrections Officers and County of Nassau, a Municipal Corporation,

JUDGMENT

Defendants.
----------X

This action came on for motions before the Court and trial before the Court and a jury, Hon. Leonard D.Wexler presiding, the motions having been decided and the issues having been duly tried, and the jury having duly rendered its verdict, it is

ORDERED AND ADJUDGED,

1. That defendants' motion for summary judgment seeking dismissal of false arrest, abuse of process and malicious prosecution claim is granted; and

2. Plaintiff's motion for summary judgment seeking to have the strip search policy in effect at the Nassau County Correctional Center declared unconstitutional is granted; and

3. That plaintiff take nothing of defendants other than nominal damages in the amount of $1.00 and that the action is dismissed on the merits.

Dated: At Hauppauge, New York
This 12th day of November, 1999

/s/ Leonard D. Wexler
Clerk of the Court

RAY E. SHAIN, Plaintiff, -against- "JOHN" ELLISON (Shield No. 761), et al., Defendants.

CV 96-3774

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

June 1, 1999, Decided

June 1, 1999, Filed

COUNSEL:
For Plaintiff: ROBERT L. HERBST, ESQ., HERBST & GREENWALD LLP, New York, New York.

For Defendants: PAUL F. MILLUS, ESQ., SNITOW & CUNNINGHAM, LLP, New York, New York.

JUDGES:
LEONARD D. WEXLER, UNITED STATES DISTRICT JUDGE.

OPINION BY:

LEONARD D. WEXLER

OPINION:

MEMORANDUM AND ORDER

WEXLER, District Judge
This is a civil rights case brought by an individual who was arrested by Nassau County Police Officers and there-

after spent a night in the Nassau County Correctional Center ("NCCC"). Plaintiff states that he was the victim of the use of excessive force and that he was subject to an unconstitutional strip search. n1 The excessive force issue is presently pending before the court and is scheduled for trial. The court rules herein on plaintiff's motion for summary judgment regarding the constitutionality of Nassau County's strip search policy.

> n1 Plaintiff's complaint also contained allegations of false arrest, abuse of process and malicious prosecution. These claims have been previously dismissed by prior order of this court.

For the reasons set forth below, the court holds that plaintiff is entitled to summary judgment on the claim that the Nassau County strip search policy, which requires a strip/visual body cavity search of all prisoners remanded to custody of the NCCC, is unconstitutional. While the court is mindful and, indeed, sympathetic, to the legitimate security and safety needs expressed by the Nassau County Sheriff, the court is constrained by clear precedent holding that a blanket strip search policy, such as that practiced by Nassau County, violates the Constitution.

BACKGROUND

I. Plaintiff's Arrest

Plaintiff was arrested by Nassau County police officers responding to a call placed by plaintiff's wife concerning a domestic dispute. While some facts are contested, it is clear that at the time of the call plaintiff and his wife were embroiled in divorce proceedings. Although plaintiff was living in the same house as his wife, an order of protection, which had expired the day before the police were called to the residence, required, *inter alia,* plaintiff

and his wife to occupy separate portions of the home.

Among the police officers responding to the domestic dispute call was defendant police officer Ellison. Because it is unnecessary, for the purposes of this ruling, to discuss the specific facts surrounding Plaintiff's arrest, the court will state here only that plaintiff was arrested and subsequently remanded by a Nassau County District Court Judge to the custody of the Nassau County Sheriff at the NCCC.

II. Plaintiff's Search at the NCCC

Upon arrival at the NCCC plaintiff was subject to that facility's procedures regarding all newly admitted prisoners. There are no questions of material fact regarding the policy for admission of new inmates to the NCCC. The Sheriff of Nassau County was deposed and testified that all individuals entering the NCCC are strip searched. n2 Additionally, the court has been provided with copies of the written procedure and has considered briefs, arguments of counsel and has heard testimony regarding the procedure. The procedure at issue is as follows.

> n2 The court herein uses the term "strip search" interchangeably with "strip/visual body cavity search." Both terms refer to searches involving the removal of all clothes and a visual inspection of body cavities. Neither term refers to a search involving any touching of the person being stripped. The searches discussed in the Second Circuit cases referred to herein appear to have been the same type of search at issue here.

All prisoners remanded to the NCCC are subject to a strip/visual body cavity search. The procedure makes no distinctions based upon the nature of the crime charged or the circumstances surrounding the particular arrest. It matters not whether a newly admitted prisoner has been remanded after a misdemeanor charge or a violent felony or

drug charge. Indeed, while the NCCC is provided with papers indicating the crime with which the inmate has been charged, the officer performing the search has no information regarding the circumstances surrounding the inmate's remand to the NCCC. Nor are officers at the NCCC provided with information indicating whether there is a reasonable suspicion as to whether a particular inmate may be concealing contraband. The provision of such information is immaterial, however, since all inmates are subject to the search.

While plaintiff takes issue with the privacy with which the search is carried out, there is little question as to the actual procedures followed. All prisoners are told to disrobe completely. They are told to run their fingers through their hair. A police officer inspects under the prisoner's arms, behind the prisoner's ears and in the prisoner's mouth. The prisoner is told to squat to facilitate a visual inspection of his buttocks. Male inmates are instructed to lift their genitals for a further visual inspection. At no time during this inspection are the prisoners touched — the body cavity search is strictly visual.

The police officer performing the search of plaintiff testified that the search took approximately one minute. Affidavit testimony attached to defendants' papers indicate that the search takes approximately two minutes. Plaintiff states that the search took approximately fifteen minutes. The court is confident that the actual inspection time lies somewhere in between these three estimates — any factual dispute concerning this issue, however is not material to the present motion.

DISCUSSION

I. Summary Judgment Standards

A motion for summary judgment may not be granted unless the court determines that no genuine issue of mate-

rial fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Donahue v. Windsor Locks Bd. of Fire Comm'rs,* 834 F.2d 54, 57 (2d Cir. 1987). Because there is no factual dispute as to the strip search procedure, this case is properly resolved in the context of a motion for summary judgment. n3

n3 Defendant's brief argued that there was reasonable suspi cion to carry out a strip search of plaintiff based upon the nature of the crime charged and the fact that plaintiff was found carrying a small knife. Defendant's conceded, how ever, that when plaintiff was strip searched at the NCCC, the officers at that facility had no information whatever regard ing the nature of plaintiff's arrest or the crime with which he was charged.

II. The Constitutionality of Strip Searches

Thirteen years before this opinion and eleven years before plaintiff was arrested, the Second Circuit held clearly and unequivocally that the Fourth Amendment precludes prison officials from performing strip searches of arrestees charged with misdemeanor or minor offenses absent a reasonable suspicion that the person being searched is concealing weapons or other contraband. The suspicion can be based upon the crime charged or the circumstances surrounding the particular arrest. *See Weber v. Dell,* 804 F.2d 796, 802 (2d Cir. 1986), *cert. denied,* 483 U.S. 1020 (1987). Any policy authorizing blanket strip searching of arrestees, without the required reasonable suspicion, is unconstitutional. *Id.* at 802.

Not only did the Second Circuit hold such blanket search policies unconstitutional in 1986, but the court further held that the constitutional right to be free from such

searches was so clearly established, even in 1986, so as to preclude the Sheriff who established the county jail policy from invoking the defense of qualified immunity. *Weber,* 804 F.2d at 803.

The unconstitutionality of a blanket strip search policy was again made clear in 1988 when the Second Circuit decided *Walsh v. Franco,* 849 F.2d 66 (2d Cir. 1988). In *Walsh,* the Second Circuit affirmed the district court's denial of a qualified immunity defense in a case involving the policy of the Chittendon County jail in Vermont. *Walsh* reiterated the holding of *Weber* and held, again, that the Fourth Amendment prohibits a blanket policy calling for strip searches of all misdemeanor or minor offense arrestees admitted to jail.

Relying on the fact that the unconstitutionality of a blanket strip search policy was sufficiently established in *Weber* so as to preclude a qualified immunity defense, the Second Circuit in *Walsh* had no trouble holding again in 1988 that defendants were not entitled to claim qualified immunity. *Walsh,* 849 F.2d at 69-70.

III. The Nassau County Policy

It is against this backdrop of clear appellate authority that this court has been asked to consider the constitutionality of the Nassau County policy of strip searching all individuals remanded to the custody of the Nassau County Correctional Center. While the Nassau County defendants have come forward with much evidence they wish this court to consider with regard to security concerns allegedly particular to the Nassau County facility, they do not deny that the strip searching policy is applied without regard to the circumstances surrounding particular arrests or the crime with which the arrestee has been charged.

In *Weber* and *Walsh,* the Second Circuit made clear that strip searches may be justified only by focusing on the

particular arrest — whether it be the nature the crime charged or the circumstances surrounding the arrest — and not on factors relating to the correctional facility. The Second Circuit has specifically rejected the argument that the mixing of arrestees along with the general jail population justifies a blanket strip search policy. Unwilling to consider generalized security concerns as justification for a blanket policy, the Second Circuit held that "the risk of a misdemeanor arrestee's introducing contraband into the general jail population simply did not warrant a strip search of all arrestees ...." *Walsh,* 849 F.2d at 69. In light of this precedent, this court is precluded from considering the institutional concerns of the NCCC. This precedent further requires that this court find that the Nassau County strip search policy, which exists without the requirement of any suspicion, is unconstitutional.

IV. County Liability

Nassau County may be liable for civil rights violations if the unconstitutional act resulting in plaintiff's injuries is, "the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts and acts may fairly be said to represent official policy ...." *Monell v. Dep't of Social Serv.,* 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1979); *Weber,* 804 F.2d at 803; *Scott v. County of Nassau,* 1998 U.S. Dist. LEXIS 19680, 1998 WL 874840 (E.D.N.Y. 1998).

Here, as in *Weber,* there is no question but that the act of the Nassau County Sheriff, in establishing and maintaining policies regarding the searching of individuals at the NCCC, amounts to the official policy of Nassau County. Accordingly, the county may be liable for injuries resulting from the execution of this policy.

V. Qualified Immunity

Defendants seek to invoke the defense of qualified immunity on behalf of the Nassau County Sheriff. As noted above, the Second Circuit held, as early as 1986, that the defense of qualified immunity was not available in cases involving blanket strip search policies. *See Weber,* 804 F.2d at 803. The unconstitutionality of a policy such as that in effect at the NCCC was clearly established at the time of plaintiff's arrest. Officials such as the Sheriff, are held to have "constructive knowledge of established law." *Walsh,* 849 F.2d at 69 (*quoting Salahuddin v. Coughlin,* 781 F.2d 24, 27 (2d Cir. 1986)). Under the circumstances present here, it cannot be established that it was objectively reasonable to believe that a strip search of plaintiff was warranted. Accordingly, the Nassau County Sheriff is not entitled to the defense of qualified immunity.

VI. Institutional Concerns At The NCCC

The court would be remiss if summary judgment were granted and the challenged practice condemned, without setting forth certain facts concerning the NCCC which gave this court great pause in striking down that facility's procedures. Had this court the latitude to consider these concerns, the outcome of this motion may well have been different.

Approximately 1,100 individuals are employed at the NCCC, 950 of whom are corrections officers. The facility houses approximately 1,800 inmates on any given day. These inmates arrive at the NCCC, in their street clothes, from a variety of places throughout Nassau County. Each year, approximately 14,000 inmates are processed for introduction to the NCCC. Upon arrival at the NCCC, the corrections officer has available the history of the inmate's offenses (if any) as well as a notation explaining the reason the inmate is being held and commitment papers noting the remand from a judge.

Inmates at the NCCC are either awaiting trial or have been sentenced. They include those charged and/or convicted of crimes ranging from murder and rape to non-violent offenders. According to defendants, the NCCC also houses members of identifiable gangs.

The court has reviewed defendants' submissions regarding security concerns and notes the difficulty in maintaining a safe facility. According to defendant's submissions (which the court recognizes have not been subject to cross-examination), a random search of inmate files revealed that in the past two years there have been six occasions when an inmate was found to have various weapons during a strip search and eight occasions when the initial strip search revealed concealed drugs. While these numbers are not very high, when compared to the number of inmates coming through the facility, the dangers posed by concealed weapons in a facility such as the NCCC are indeed great.

Corrections officers at the NCCC are concerned not only with protecting themselves and other employees, but with protecting the safety of other inmates. Indeed, a failure to properly protect inmates may well result in the imposition of civil liability.

While the court is clear that the precedent established by *Weber,* and reiterated in *Walsh,* precludes this court from upholding a blanket strip search policy in the absence of reasonable suspicion regarding the arrest, the court notes that the prison facilities at issue in both *Weber* and *Walsh* were undoubtably different, in many important respects, from the facility at issue here. While the court does not profess to have an intimate knowledge of the inner workings of the Monroe County, Rochester jail (at issue in Weber) or the Chittenden County, Vermont jail (at issue in Walsh), or even of the size of those facilities, the court questions whether the institutional concerns present

at the NCCC can be fairly compared to these facilities. In sum, a full consideration of the facts surrounding the NCCC and its particular concerns may have resulted in a finding that a one or two minute strip search conducted in privacy might well be warranted when balanced against the concerns of this particular institution. The court makes no finding as to the proper outcome of this balance. Certainly, it would have been necessary to take additional testimony and have each party present their side of the story. Given the state of the law, however, the court could not properly consider this evidence.

CONCLUSION

The policy of strip searching all misdemeanor and minor offense arrestees remanded to NCCC, without requiring any suspicion that the remanded individual is concealing weapons or other contraband, violates the Fourth Amendment to the United States Constitution. Plaintiff's motion for summary judgment with regard to the strip searching policy in effect at the Nassau County Correctional Center is granted.

SO ORDERED.

s/_____
LEONARD D. WEXLER

UNITED STATES DISTRICT JUDGE

Dated: Hauppauge, New York
June 1, 1999

MITCHELL WAYNE THOMAS, Plaintiff-Appellant-Cross-Appellee, v. LARRY LESLIE, Reno County Sheriff, Defendant-Appellee-Cross-Appellant.

Nos. 97-3346, 97-3361

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

April 21, 1999, Filed

NOTICE:
RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL:
For MITCHELL WAYNE THOMAS, Plaintiff-Appellant: Mitchell Wayne Thomas, Huntsville, TX.

For LARRY LESLIE, Defendant - Appellee: Michael Jilka, Wendell F. Cowan, Jr., Shook, Hardy & Bacon, Overland Park, KS.

JUDGES:
Before PORFILIO, KELLY, and HENRY, Circuit Judges.

OPINION BY:
ROBERT H. HENRY

OPINION:

ORDER AND JUDGMENT *

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument.

This appeal (No. 97-3346) and cross appeal (No. 97-3361) are taken from decisions granting summary judgment to Sheriff Leslie in No. 97-3346 and to Mr. Thomas in No. 97-3361. They arise from an action filed by Mr. Thomas pursuant to 42 U.S.C. § 1983, in which he claimed his constitutional rights were violated while he was incarcerated at the Reno County Detention Center (RCDC) from December of 1992 through May of 1994. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm in part and reverse in part.

Mr. Thomas raised three claims in his verified complaint. *See* Thomas App. at 1-6. Judgment on the first claim, alleged denial of access to the courts, has not been ap-

pealed, nor has the denial of declaratory and injunctive relief. For his second claim, Mr. Thomas alleged that the absolute ban on newspapers at the jail violated his First Amendment rights. In his third claim, Mr. Thomas contended that he was denied an hour of exercise per day outside his cell in violation of his Eighth and Fourteenth Amendment rights. Mr. Thomas sought $ 15,000 in compensatory damages. *See id.* at 5. The parties filed cross motions for summary judgment with supporting documentation and affidavits. Sheriff Leslie also filed a Martinez n1 report and a supplemental report.

> n1 *See Martinez v. Aaron,* 570 F.2d 317, 319-20 (10th Cir. 1978) (per curiam) (approving district court's use of report filed by prison officials as administrative record).

Background

Mr. Thomas was incarcerated at the RCDC, after being extradited from a facility in Texas, pending disposition of state charges against him in Kansas. During his stay at the RCDC, he was briefly transferred on several occasions to a mental health center, the state hospital, and the county jail. Following his conviction in Kansas, he was transferred back to Texas.

No. 97-3346

In his complaint, Mr. Thomas claimed the failure to provide him with "one hour of recreation outside [his] cell per day violated his constitutional rights under the 8th & 14th Amendments." Thomas App. at 4. In subsequent pleadings, he alleged that because he was under a doctor's care for stomach pains and depression, "it may certainly be argued that the lack of exercise contributed greatly to

[plaintiff's] medical problems ...." R. Doc. 24, Plaintiff's Response to Defendant's Motion for Summary Judgment, at 13.

In his initial Memorandum and Order, the district court found that there were sometimes delays of over a week between inmate visits to the exercise area in the basement of RCDC, *see* Thomas App. at 48, that Mr. Thomas had access to the day room n2 adjoining his cell for at least seventeen hours daily and was permitted to exercise there, and that RCDC intended to provide each inmate with an opportunity for out-of-cell exercise at least weekly, but was not always able to achieve the goal. *See id.* at 49. The court further found that Mr. Thomas filed a grievance with Sheriff Leslie, who admitted telling Mr. Thomas that the exercise area was not available on a daily basis. *See id.* at 48.

> n2 Apparently the day rooms were used for multiple activities, including eating, watching television, and showering.

The court held that under *Wilson v. Seiter,* 501 U.S. 294, 298-303, 115 L. Ed. 2d 271, 111 S. Ct. 2321 (1991), the Supreme Court noted that an Eighth Amendment claim has two components—a subjective component (did jail officials act with a sufficiently culpable state of mind, i.e., deliberate indifference?) and an objective one (was the deprivation serious?). *See* Thomas App. at 62; *see also Farmer v. Brennan,* 511 U.S. 825, 834, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994) ("In prison-conditions cases that [sufficiently culpable] state of mind is one of 'deliberate indifference' to inmate health or safety") (further citations omitted). The court ruled that because the right to a minimal amount of out-of-cell exercise was clearly established at the time of Mr. Thomas's incarceration, the subjective component requiring deliberate indifference had been satisfied. *See id.* at 62-63. We assume that the district court

recognized that the subjective component of deliberate indifference would be satisfied by a showing that Sheriff Leslie was aware of an exercise requirement, given the policy, and knowingly failed to implement it. *See Allen v. Sakai,* 48 F.3d 1082, 1088 (9th Cir. 1994). "This is not a case where defendants claim that they were unaware of either the circumstances resulting in the alleged deprivation or the likelihood that the deprivation would occur." *Id.*

As to the objective component, the court noted this court's decision in *Housley v. Dodson,* 41 F.3d 597, 599 (10th Cir. 1994), as recognizing that the "failure to provide inmates confined for more than a short period of time with the opportunity for at least five hours a week of exercise outside the cell raises serious constitutional questions." *See* Thomas App. at 63.

Because of the parties' disputes as to the real conditions at the jail (e.g., crowded day rooms, Thomas's length of confinement, unsanitary nature of day room as an exercise area), and any damages Mr. Thomas may have incurred to his physical or mental health, the court found that issues of fact existed as to the conditions of Mr. Thomas's confinement with regard to adequate opportunity for exercise. The court then ordered a supplemental Martinez report, directing Sheriff Leslie to include Mr. Thomas's medical records and to "fully address the factors announced in *Housley* which a district court is to consider when evaluating a claim that a prisoner was denied an adequate opportunity for out-of-cell exercise." *See id.* at 65-66.

Sheriff Leslie filed a supplemental Martinez report, which included an affidavit of the captain of the RCDC, Mr. Thomas's medical records, some of the records (gym logs) of those inmates who had signed up to attend the exercise area, a description of the exercise area and its equipment, a description of the jail (cell and day room fa-

cilities), the inmate rule book, information on the average stay of inmates at the RCDC, a gym request slip indicating Mr. Thomas's refusal to attend an exercise session, and other miscellaneous documents. *See* R. Doc. 44 and Thomas App. at 67-106. Mr. Thomas filed a lengthy and detailed response specifically disputing both factual statements and conclusions presented in the Supplemental Martinez report. *See* Thomas App. at 107-139.

In his second Memorandum and Order, the district court found that the RCDC inmates were given the opportunity for out-of-cell exercise once a week, that the goal was to provide each inmate with an hour of exercise a week, but that the sessions usually lasted only twenty to forty minutes, that the sessions were frequently canceled, and that for approximately six months toward the end of Mr. Thomas's incarceration no opportunity for out-of-cell exercise was provided because of an escape from the exercise room. *See id.* at 141.

The court further found that an inmate wishing to participate in attending the exercise area was required to submit a request form before 7:00 a.m. on the day scheduled for exercise and that Mr. Thomas had submitted only one such request to participate in the exercise sessions (and had refused to go when the time came). The court determined that Mr. Thomas admitted "he did not take advantage of the out-of-cell opportunities that were made available to him." See id. at 141-142. The court also ruled that the exercise sessions lasted at least twenty minutes, and that Mr. Thomas "certainly could have received some benefit from participating on a weekly basis." *See id.* at 142. In granting summary judgment to Sheriff Leslie, the court concluded that because Mr. Thomas had refused to participate in the exercise opportunities made available to him, Mr. Thomas could not "show that his mental or physical health deteriorated because [Sheriff] Leslie failed to pro-

vide additional opportunities for out-of-cell recreation." *See id.* at 143.

Summary Judgment

We review the district court's grant of summary judgment *de novo,* applying the same legal standard used by the district court. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "'When applying this standard, we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment.'" *Kaul v. Stephan,* 83 F.3d 1208, 1212 (10th Cir. 1996) (*quoting Wolf v. Prudential Ins. Co. of Am.,* 50 F.3d 793, 796 (10th Cir. 1995)). "The relevant inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Bingaman v. Kansas City Power & Light Co.,* 1 F.3d 976, 980 (10th Cir. 1993) (quotation omitted). "Facts must be identified by reference to affidavits ... or specific exhibits incorporated therein." *Adler v. Wal-Mart Stores, Inc.,* 144 F.3d 664, 671 (10th Cir. 1998).

Martinez Reports

We have long permitted use of a court-authorized [Martinez] report by prison officials as part of the determination as to "whether a pro se prisoner's allegations have any factual or legal basis." *See Northington v. Jackson,* 973 F.2d 1518, 1521 (10th Cir. 1992). "On summary judgment, a Martinez report is treated like an affidavit, and the

court is not authorized to accept its fact findings if the prisoner has presented conflicting evidence." *Id.* (further citation omitted). In addition, a plaintiff's complaint may be treated as an affidavit where, as here, it "alleges facts based on the plaintiff's personal knowledge and has been sworn under penalty of perjury." *Hall v. Bellmon,* 935 F.2d 1106, 1111 (10th Cir. 1991). However, a court may not resolve material disputed issues of fact by accepting the Martinez report's factual findings when they are in conflict with pleadings or affidavits. *See id.* at 1109. "A bona fide factual dispute exists even when the plaintiff's factual allegations that conflict with the Martinez report are less specific or well-documented than those contained in the report." *Id.*

Here, the district court found that inmates were given the "opportunity to exercise out of their cells once a week." Thomas App. at 141. The Supplemental Martinez Report attached an affidavit of a captain at the RCDC stating that Mr. Thomas "was afforded the opportunity to exercise at least once a week in the Exercise Area between December 11, 1992 to December 3, 1993, if he filled out a Request Slip for that activity." Id. at 80. The district court also found, however, that exercise sessions usually lasted only twenty to forty minutes, and that the sessions were frequently canceled. *See id.* at 141.

On appeal, Mr. Thomas argues that material questions of fact exist with respect to his opportunity for adequate exercise outside of his cell. Mr. Thomas relies on our decision in *Housley,* 41 F.3d at 599 (10th Cir. 1994), for his claim that he was entitled to five hours a week of exercise out of his cell. n3 He contends that Sheriff Leslie's Supplemental Martinez Report, *see* Thomas App. at 67, *et seq.,* was also inadequate because the records supplied, i.e., the gym "logs," were incomplete. Specifically, Mr. Thomas claims that the gym logs, which list the names of

inmates who had signed up for the exercise area, exclude the first seven months of Mr. Thomas's incarceration at RCDC and include a six-month period after he had returned to Texas. *See id.* at 84-106. From this "omission of records," he concludes that "the records themselves raise material issues of fact." Thomas Br. at 12. He argues that had the records been complete as ordered by the district court, "the court would have been fully aware of all the cancellations, and the court's ruling then should have been different and in favor of ... Thomas." *Id.* at 13. He further explained that the gym logs attached to the supplemental Martinez report actually demonstrate that even inmates who did sign up for the exercise period were not necessarily afforded the opportunity because there was an insufficient amount of time available to accommodate all the inmates desiring to participate. He also points out the numerous cancellations of exercise periods and the total lack of exercise opportunity for six months between December of 1992 and June of 1994. *See* Thomas App. at 121-25, 80; 133-37. These material disputed issues of fact undercut the court's finding that Mr. Thomas was provided the opportunity for weekly exercise.

> n3 In *Housley*, 41 F.3d at 599 (10th Cir. 1994), we held that an inmate who claimed he received only thirty minutes of out-of-cell exercise in three months had stated a claim that his constitutional rights were violated. We also held that "the right to some exercise was clearly established at the time of Mr. Housley's confinement," which appears to have been prior to 1993. *See id.* We relied in part on *Bailey v. Shillinger,* 828 F.2d 651, 653 (10th Cir, 1987), in which we had recognized that "some form of regular outdoor exercise is extremely important to the psychological and physical well-being of inmates." We have recently affirmed the principles expressed in *Housley* and *Bailey. See Perkins v. Kansas Dep't of Corrections,* 165 F.3d 803, 810 (10th Cir. 1999); *see also*

Williams v. Greifinger, 97 F.3d 699, 704-705 (2d Cir. 1996) (discussing prisoners' rights to some opportunity for exercise); *Mitchell v. Rice,* 954 F.2d 187, 191 (4th Cir. 1992) (generally prisoner "should be permitted some regular out-of-cell exercise"); *Davenport v. DeRobertis,* 844 F.2d 1310, 1315 (7th Cir. 1988) (recognizing number of decisions hold ing that failure to provide inmates confined for more than a short period with opportunity for at least five hours' weekly exercise outside cell raises serious constitutional questions). Although we have referenced five hours of exercise per week, we have declined to adopt a set weekly total for regular or daily exercise. *See Housley,* 41 F.3d at 599.

The district court erred in accepting the facts as set forth in the Martinez reports, where, as here, Mr. Thomas presented conflicting evidence. *See Northington,* 973 F.2d at 1521. *See also Craig v. Eberly,* 164 F.3d 490, 496 (10th Cir. 1998) (noting factual dispute where inmate alleged he was allowed only two one-hour exercise periods during total confinement and jailors claimed he received one hour per week, weather permitting). Thus, the court's conclusion that Mr. Thomas "could have received some benefit from participating [in the exercise period] on a weekly basis" (*see* Thomas App. at 142) is also flawed, because of the factual dispute as to how much exercise time was really afforded inmates at RCDC.

Accordingly, we vacate the district court's judgment as to the exercise claim and remand the matter for further proceedings.

No. 97-3361

The district court also held that the absolute ban n4 on newspapers violated Mr. Thomas's First Amendment rights. The court granted summary judgment to Mr. Thomas on this claim, awarding nominal damages in the amount of $ 1.00.

n4 There is no factual dispute that newspapers are not permitted at the RCDC. Thomas Appendix at 13.

The district court analyzed the RCDC rule forbidding newspapers under the balancing test set forth in *Turner v. Safley,* 482 U.S. 78, 89-90, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987). We have described this analysis as follows:

To determine whether the prison action is "reasonably related to legitimate penological interests," *Turner* erects a balancing test, and it directs lower courts to weigh the following factors. First, the lower court should inquire into whether there is a "valid, rational connection" between the prison action and the "legitimate government interest put forward to justify it." Second, the lower court should determine whether "there are alternative means of exercising the right that remain open to prison inmates." Third, the court should evaluate "the impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." And finally, the court should look for the presence of "obvious, easy alternatives" to the disputed prison activity. Of course, in conducting this analysis, the Supreme Court advises repeatedly that substantial deference is to be accorded to the prison authorities.

Frazier v. Dubois, 922 F.2d 560, 562 (10th Cir. 1990) (internal citations and footnote omitted).

Sheriff Leslie argued that the ban on newspapers was rationally related to concerns that newspapers could be used to start fires n5 or as weapons and that the accumulation of papers constituted a health hazard. The sheriff admitted that inmates were permitted a soft-back Bible and

that they "have access to puzzle books and paperback books via the commissary." Thomas App. at 13. As to the first *Turner* factor, the court determined that because other materials presenting the same security and safety concerns were not restricted, the newspaper ban was not rationally related to the sheriff's stated objective. n6 *Id.* at 57.

> n5 In his initial Martinez report, the sheriff acknowledged that RCDC "is smoke-free and matches and lighters were not permitted." Thomas App. at 15.
>
> n6 No argument was advanced that the content of the news papers posed a security risk. *See Thornburgh v. Abbott,* 490 U.S. 401, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989) (up holding regulations allowing exclusion of certain publica tions found on individualized basis to be potentially detri mental to order and security).

Sheriff Leslie also claimed that access to television, which included local and cable news channels, constituted an alternate means of exercising the right to remain informed about community and national news. He cites no authority for this proposition, nor did he dispute Mr. Thomas's claim (also repeated in an affidavit) that because a majority vote of the inmates in each cell governs what programs are in fact watched, Mr. Thomas was not able to view the news programs he wanted to.

The court found that the alternative means test would allow Sheriff Leslie to prohibit all reading material under the theory that television provides an adequate substitute for all written communications and that this second Turner factor also weighed against upholding the rule. *See id.* at 58.

The court found that as to the third *Turner* factor, the impact of accommodating the right, any such impact of al-

lowing newspapers would be minimal in view of the permitted access to paperback and puzzle books and soft back Bibles. *See id.*

Finally the court determined that an obvious and easy alternative existed to the sheriff's expressed concerns underlying the rule and was thus evidence that the rule was not reasonable but rather an "'exaggerated response' to prison concerns." *See Turner,* 482 U.S. at 90. The alternative identified by the district court was a policy approved for use at another county jail which required inmates to turn in one publication before receiving another, thus reducing the amount of combustible material in the jail. *See* Thomas App. at 58-59. Concluding that the blanket prohibition on newspapers violated Mr. Thomas's First Amendment rights, the court granted him summary judgment on this claim and awarded nominal damages of $ 1.00.

On appeal, Sheriff Leslie claims that the district court failed to properly balance the newspaper ban as a proper penological interest against Mr. Thomas's right to read newspapers. *See Turner,* 482 U.S. at 89 ("when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."). The sheriff also contends that he is entitled to qualified immunity on this claim because the right to access newspapers was not clearly established.

Qualified Immunity

Once a defendant claims he is qualifiedly immune, the burden is on the plaintiff to establish both that defendant's actions violated a constitutional or statutory right and that the right allegedly violated was clearly established at the time of the conduct at issue. *See Albright v. Rodriquez,* 51 F.3d 1531, 1534 (10th Cir. 1995). In order to be clearly

established, "'the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* at 1535 (*quoting Anderson v. Creighton,* 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987)). Generally, for a right to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Trigalet v. Young,* 54 F.3d 645, 648 (10th Cir. 1995) (further quotation omitted). However, this test is not rigid, and a plaintiff is not required to cite a factually identical case to demonstrate that the law was clearly established. *See Baptiste v. J.C. Penney Co.,* 147 F.3d 1252, 1257-58 n.9 (10th Cir. 1998), *citing Clanton v. Cooper,* 129 F.3d 1147, 1156 (10th Cir. 1997). Instead we have adopted the approach of "requiring some but not precise factual correspondence in demanding that officials apply general, well-developed legal principles ...." *Clanton,* 129 F.3d at 1157 (*quoting Lawmaster v. Ward,* 125 F.3d 1341, 1351 (10th Cir. 1997)). Accordingly, we must ascertain whether as of December of 1992 it was clearly established that a blanket prohibition of newspapers was unconstitutional. *See Trigalet,* 54 F.3d at 648.

Right to Read Newspapers

"[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier,* 417 U.S. 817, 822, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974). *See also Bell v. Wolfish,* 441 U.S. 520, 545, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979) ("our cases have held that sentenced prisoners enjoy freedom of speech and religion under the First and Fourteenth Amendments"); *Kleindienst v. Mandel,* 408 U.S. 753, 762,

33 L. Ed. 2d 683, 92 S. Ct. 2576 (1972) ("The Constitution protects the rights to receive information and ideas.") (further citations omitted).

Although neither the Supreme Court nor this court have specifically held that a prisoner is entitled to read newspapers, other courts have addressed the issue. *See, e.g., Van Cleave v. United States,* 854 F.2d 82, 84 (5th Cir. 1988) (plaintiff stated claim for relief where complaint alleged his request for newspaper denied); *Green v. Ferrell,* 801 F.2d 765, 772 (5th Cir. 1986) (jail's prohibition on newspapers violates First Amendment); *Mann v. Smith,* 796 F.2d 79, 82 (5th Cir. 1986) (ban on newspapers and magazines represents exaggerated response to legitimate need to preserve discipline and maintain security); *Sizemore v. Williford,* 829 F.2d 608, 610 (7th Cir. 1987) (absent restrictions based on legitimate goals of confinement, prison inmates retain First Amendment right to receive and read newspapers); *Kincaid v. Rusk,* 670 F.2d 737, 744 (7th Cir. 1982) (total ban on newspapers unjustifiable when hazards of newspaper possession could as well be caused by reading material detainees were permitted to have).

A number of district courts have also recognized prisoners' rights to read newspapers. *See, e.g., Parnell v. Waldrep, 511* F. Supp. 764, 767-68 (W.D.N.C. 1981) (refusal to allow jail inmates to receive newspapers is unconstitutional); Hutchings v. Corum, 501 F. Supp. 1276, 1299 (W.D. Mo. 1980) (absolute denial of access to newspapers violates inmates' First Amendment guarantees); *Mitchell v. Untreiner,* 421 F. Supp. 886, 895 (N.D. Fla. 1976) (failure to permit inmates to read daily newspaper denied First Amendment freedom of speech, association, and right to be informed citizens in democratic society); *Payne v. Whitmore,* 325 F. Supp. 1191, 1193 (N.D. Cal. 1971) (that right to receive newspapers and magazines is part of First

Amendment is beyond question).

We agree with the district court that the absolute ban on newspapers does not constitute a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forth to justify it," *Turner,* 482 U.S. at 89 (further quotation omitted), particularly where the hazards concerning Sheriff Leslie could as well be caused by the permitted reading materials. *See Kincaid,* 670 F.2d at 744; *Mann,* 796 F.2d at 82 (because jail has no smoking rule and inmates are permitted to have other forms of paper, official rationale for banning newspapers seems tenuous at best).

Nor are we persuaded by Sheriff Leslie's argument that access to television provides an adequate alternative to newspapers. Television cannot supply the depth and diversity of coverage that newspapers can provide. Mr. Barnett's affidavit] states he was unable to watch news programs because of the majority vote rule controlling what programs were watched. Sheriff Leslie has not disputed this statement. Moreover,

> it is not up to the [county sheriff] or this court to decide that television can adequately service the first amendment right to receive protected materials. Rather, we must apply the principle that a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.

See Mann, 796 F.2d at 83 (footnote and citation omitted).

We therefore conclude that the contours of an inmate's right to access to newspapers was "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *See Anderson,* 483 U.S. at

640; *cf. Housley,* 41 F.3d at 600 ("[a] reasonable sheriff and jailer must remain apprized of major constitutional developments concerning inmates' rights."). The district court correctly held that Sheriff Leslie was not entitled to qualified immunity on this claim, and judgment as to this claim is affirmed.

Accordingly, in appeal No. 97-3346, the district court's judgment is REVERSED, and the matter is REMANDED for further proceedings. In appeal No. 97-3361, the district court's judgment is AFFIRMED. The mandates shall issue forthwith.

Entered for the Court

Robert H. Henry

Circuit Judge

ROBERT L. POLK, Plaintiff-Appellant, v. RICKY PARNELL, Head Jailer; HAROLD GARRISON, Fulton County Judge Executive; FULTON COUNTY FISCAL COURT; CITY OF HICKMAN, Defendants-Appellees.

No. 96-5711

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

December 8, 1997, Filed

NOTICE:
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ROBERT L. POLK, Plaintiff - Appellant, Pro se, Eddyville, KY.

For RICKY PARNELL, HAROLD GARRISON, Defendants - Appellees: W. Kenneth Nevitt, R. Thaddeus Keal,

Sun S. Choy, Williams & Wagoner, Louisville, KY.

JUDGES:

Before: MERRITT, BATCHELDER, and FARRIS, * Circuit Judges.

* The Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

OPINION:

ORDER

Robert L. Polk appeals a district court order granting summary judgment for the defendants in his civil rights action filed pursuant to 42 U.S.C. § 1983. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary, declaratory, and injunctive relief, Polk sued the jailer of the Fulton County (Kentucky) Jail, the Fulton County Judge Executive, the Fulton County Fiscal Court, and the City of Hickman. Polk sued the jailer and the judge executive in their individual capacities, as well as suing the jailer in his official capacity. Polk alleged that the defendants: 1) subjected him to numerous conditions of confinement that violated the Eighth Amendment; 2) were deliberately indifferent to his serious medical needs; 3) improperly placed him in security lock down; 4) improperly restricted his visitation and religion privileges; 5) discriminated against him because of his race; and 6) attempted to entrap him into committing a crime. The district court concluded that Polk's allegations were without merit and granted summary judgment for the defendants. Polk has filed a timely appeal.

We initially note that in this appeal Polk argues only that the defendants: 1) subjected him to conditions of confinement violating his Eighth Amendment rights by confining him in an overcrowded cell, providing insufficient razors for shaving, and providing only plastic utensils for eating; 2) were deliberately indifferent to his back, foot, and stomach problems; 3) improperly placed him in security lock down; and 4) improperly restricted his visitation and religion privileges. Consequently, Polk's remaining claims are considered abandoned and not reviewable. *Boyd v. Ford Motor Co.*, 948 F.2d 283, 284 (6th Cir. 1991), *cert. denied*, 503 U.S. 939, 117 L. Ed. 2d 624, 112 S. Ct. 1481 (1992).

Upon review, we conclude that the district court properly granted summary judgment for the defendants. This court renders de novo review of a district court order granting summary judgment. *Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174, 178 (6th Cir. 1996). Summary judgment is proper if no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Id. The moving party must show an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once the moving party has met this burden, the non-moving party must designate specific facts showing that a genuine issue exists for trial. *Id.* at 324.

The district court properly granted summary judgment on Polk's claims that the defendants subjected him to unconstitutional conditions of confinement because his allegations fail even to state a claim. During his incarceration at the Fulton County Jail, Polk was a pretrial detainee. The Eighth Amendment's protection against cruel and unusual punishment extends to pretrial detainees through the Fourteenth Amendment's Due Process Clause, *see Whit-*

ley v. Albers, 475 U.S. 312, 327, 89 L. Ed. 2d 251, 106 S. Ct. 1078 (1986), and thus claims by pretrial detainees challenging conditions of confinement are analyzed under the Eighth Amendment. *See Thompson v. County of Medina,* 29 F.3d 238, 242 (6th Cir. 1994). To establish a violation of the Eighth Amendment, the offending conduct must reflect an unnecessary and wanton infliction of pain. *Whitley,* 475 U.S. at 319. A viable Eighth Amendment claim has an objective and subjective component. *Farmer v. Brennan,* 511 U.S. 825, 834, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994). The objective component requires that the pain be serious, *Hudson v. McMillian,* 503 U.S. 1, 8-9, 117 L. Ed. 2d 156, 112 S. Ct. 995 (1992), and the subjective component requires that the defendant act with deliberate indifference to an inmate's health or safety. *Wilson v. Seiter,* 501 U.S. 294, 302-03, 115 L. Ed. 2d 271, 111 S. Ct. 2321 (1991). Polk's allegations that the defendants improperly confined him in an overcrowded cell, provided insufficient razors for shaving, and provided only plastic utensils for eating fail even to state a claim for an Eighth Amendment violation.

Polk's allegation that he was not provided with prescribed medications for his back, foot, and stomach conditions is also meritless. While Polk has submitted medical forms indicating that he was prescribed these medications, he has not alleged that the individual defendants were responsible for withholding the prescriptions. His claim appears to rely on the doctrine of respondeat superior and this doctrine is not applicable in a § 1983 action. *Taylor v. Michigan Dep't of Corrections,* 69 F.3d 76, 80-81 (6th Cir. 1995).

Polk's allegation that the defendants improperly placed him in lock down also fails to state a claim. Polk argues that

the defendants improperly placed him in lock down for four days. However, Polk's short stay in disciplinary segregation was not such an atypical and significant hardship as to create a liberty interest requiring due process. *See Sandin v. Conner,* 515 U.S. 472, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418 (1995). Further, the defendants' restrictions on Polk's religion and visitation privileges were reasonably related to legitimate penological interests. *Turner v. Safley,* 482 U.S. 78, 89, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987).

Accordingly, this court affirms the district court's judgment. Rule 9(b)(3), Rules of the Sixth Circuit.